ONTARIO ATTORNEY GENERAL LAW LIBRARY
[redacted] STK
Report of the Attorney General's Advisor
00000953

Ministry of the
Attorney
General

Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act

April, 19[illegible]

JUL 29 1986
MINISTRY OF
ATTORNEY GENERAL
LIBRARY

KF
900
O55
1982
c.1

Report of the Attorney General's
Advisory Committee on the Draft
Construction Lien Act

Issued To

KF
900
O55
1982
c.1

Report of the Attorney General's
Advisory Committee on the Draft
Construction Lien Act

MINISTRY OF
ATTORNEY GENERAL
LIBRARY

Additional Copies of this Discussion Paper
may be obtained from:

Publications Centre,
5th. Floor,
880 Bay Street,
TORONTO, Ontario,
M7A 1N8

ATTORNEY-GENERAL'S
DEPARTMENT
ONTARIO

REPORT OF THE ATTORNEY GENERAL'S

ADVISORY COMMITTEE

ON

THE DRAFT CONSTRUCTION LIEN ACT

April 8, 1982

6641

KF/900/055 sb P6m sc 1-4

Digitized by the Internet Archive
in 2017 with funding from
Ontario Council of University Libraries

https://archive.org/details/mag_00000953

LETTER OF TRANSMITTAL

April 8, 1982

The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario,
18 King Street East,
Toronto, Ontario.

Sir:

We, the undersigned members of your Advisory Committee on the Draft Construction Lien Act, requested by you in May, 1981 to advise you on the proposed Construction Lien Act, have now the honour to submit our unanimous Report.

Many diverse groups comprise the construction industry. These are: workers, materialmen, subcontractors, contractors, owners and other consumers of construction improvements, commercial sureties, and those who finance construction. The interests of these sectors rarely coincide. Consequently, from the beginning of our deliberations, it was clear to us that any attempt to reform the mechanics' lien law of this Province would require a spirit of compromise and cooperation between these diverse groups. Acting in this spirit, we have attempted to devise a scheme that strikes a reasonable balance between the often competing interests of the various sectors of the industry. Though as individuals we were not always in agreement with each of the proposed changes, nevertheless, as a group we can and do support this Report as a package.

Stephen V. Fram

Lloyd D. Cadsby, Q.C.

Norman Ross

Howard Devry, Q.C.

James Shapland

James F. Heal

Leonard W. Stewart, Q.C.

Harvey Kirsh

Robert Stupart, Q.C.

Raymond Koskie, Q.C.

Paul Thomson

Master D.D. MacRae

PREFACE

In November, 1980, the Ministry of the Attorney General released a Discussion Paper entitled "The Draft Construction Lien Act". This Discussion Paper contained extensive proposals expressly intended to prompt, and serve as the framework for, extensive discussions in respect to the reform of the Ontario law of mechanics' liens. It did: the Ministry received numerous letters and formal submissions in respect to the Discussion Paper from many individuals, trade associations and labour unions. All sections of the construction industry responded.

On May 25, 1981, the Honourable R. Roy McMurtry, Attorney General for Ontario, established his Advisory Committee on the Draft Construction Lien Act. The Advisory Committee was given the following terms of reference:

1. A review of the Draft Act and consideration of responses to the Discussion Paper from all perspectives of the construction industry;

2. The preparation of a report on the Committee's findings and recommendations; and

3. The examination and approval of draft legislation modifying the provisions of the Draft Act to implement the Committee's recommendations.

The members of the Committee were also invited to bring forward and develop their own proposals for reform, based upon their individual experience and expertise. Since their appointment to this Committee, the members of the Committee have conducted an extensive review of mechanics' lien law, and the proposals contained in this Report constitute the result of our deliberations.

In drafting our proposals, the Committee has endeavoured to develop a system of rights and obligations which provide a fair yet realistic level of protection to all persons engaged in the industry. The Committee has attempted to balance the protection which a particular proposal might provide against the damage that it might cause to other segments of the industry, and against the costs which it would impose upon the industry and ultimately upon the consumer. In developing this scheme of reform, we have been mindful that any system whose cost is too high might result in a significant decrease in the level of construction, to the detriment of all persons engaged in the industry. In developing our proposals, we have used the Discussion Paper as it was intended: as a framework for analysis. We have not felt ourselves bound by its recommendations, and have felt free to depart from those proposals where we believe that they were unrealistic. We have attempted to canvass the concerns of all branches of the industry, including contractors, subcontractors, workers, sureties, material suppliers, owners and mortgagees, and all proposals for the new Act have been critically evaluated by considering their impact on each of these groups.

Like the Discussion Paper, the Committee's report is divided into two parts. Part I of the report sets out in concise terms an explanation of the purpose of the remedies provided by the mechanics lien law of Ontario, and contains a summary of the principal recommendations of the Committee. Part II contains a revised draft Construction Lien Act (the Committee Draft), in which the Committee's specific proposals for reform are defined in detail. The Committee Draft is annotated with extensive explanatory comments in respect to each of the provisions proposed for the new Act. For ease of reference, the corresponding provisions of the Discussion Draft and the Mechanics' Lien Act are also included.

The Committee has examined and approved the Committee Draft and hopes that its preparation will expedite the reform process. In our opinion, there is little to be gained from further discussion of reform. While detailed, technical errors in the Draft will undoubtedly be found and corrected before the enactment of legislation, it is our hope that our proposals as set out in the Committee Draft will be enacted as soon as possible. We note that there is widespread support within the construction industry for the speedy amendment of the Mechanics' Lien Act, and we also note the widespread dissatisfaction with the operation of the present Act. The Ministry of the Attorney General's efforts to reform the mechanics' lien law of Ontario have been matters of interest and concern to the industry for several years. It is our hope that the release of this Report will be the last step before legislation is introduced.

No work of this size could be executed without the assistance of many people. We would like to give express recognition to some of the many people who helped us in our efforts. The two lawyers who served successively as Secretary to the Committee, Fredric L. Maefs and Kevin P. McGuinness, played a central role in our work. Fred Maefs created a set of materials that provided members with the benefit of each comment on the Discussion Draft received from the public on a section-by-section basis. He also devised methods that maximized the effective use of the members' time. His quiet manner and delightful sense of humour lightened the weight of a very serious task. The value of Kevin McGuinness' service to the Committee cannot be exaggerated. Even before serving as Secretary, Kevin McGuinness volunteered his every free moment to the Committee as advisor, doing research without which the Committee would have been severely hampered in its considerations. After assuming the function of Secretary, Kevin McGuinness devoted his time to the Committee meetings, the development of alternatives for Committee consideration and was responsible, in large measure, for the preparation of this report.

The Committee is most grateful to the skillful secretarial assistance of Ms. Isabelle MacWilliam and to the careful and tireless efforts of the word processing staff of the Programs and Administration Division of the Ministry of the Attorney General, under the supervision of Mrs. Norma Pestano. Without their skills, this report could not have been written.

THE ADVISORY COMMITTEE

The Committee Members:

Stephen V. Fram, Chairman

Lloyd D. Cadsby, Q.C.

Howard Devry, Q.C.

James F. Heal

Harvey J. Kirsh

Raymond Koskie, Q.C.

Master D.D. MacRae

Norman Ross

James Shapland

Leonard W. Stewart, Q.C.

Robert Stupart, Q.C.

Paul Thomson

Substitute Members:

Geza R. Banfai

Victor L. Freidin

David J. Kee

Richard C. McIvor

William J. Smith

Mark Zigler

Secretaries to the Committee:

Fredric L. Maefs

Kevin P. McGuinness

TABLE OF CONTENTS

Preface i

Members of The Attorney General's Advisory Committee on the Draft Construction Lien Act v

Table of Contents vi

PART I OF REPORT

SUBJECT	PAGE
1. The Reason for Reform	xx
2. General Recommendations for Reform	xxv
(a) Consumer Home Improvements	xxv
(b) Appointment of Part-time Masters	xxvi
(c) Replacement of the Mechanics' Lien Act With a Wholly Rewritten New Act	xxvii
3. Summary of Specific Proposals Contained in the Committee Draft of the Construction Lien Act	xxix
(1) Extend the Special Priority Afforded to Worker's Lien Claims for Wages	xxix
(2) Reduction of the Rate of Holdback to 10%	xxx
(3) Clarification of the Trust Provisions	xxxiii
(4) Clarification of the Lien Provisions	xxxv
(5) Securing the Holdback	xxxv
(6) Clarification of Time of Expiration of Lien Rights and the Time When the Holdback may be Released	xxxvii
(7) Vacating and Discharging Lien Claims	xxxix
(8) Rights to Information	xxxix
(9) Reform Enforcement Procedure	xl
(10) Clarification of Priorities	xli

PART II OF REPORT

(CONTENTS OF COMMITTEE DRAFT OF ACT)

SECTION	TOPIC	PAGE
1	Interpretation	1-25
1(1)	- Definitions	1-22
1(1)1	"action"	2
1(1)2	"construction trade newspaper"	3
1(1)3	"contract"	3
1(1)4	"contractor"	4
1(1)5	"court"	5
1(1)6	"Crown"	6
1(1)7	"holdback"	6
1(1)8	"improvement"	7
1(1)9	"interest in premises"	8
1(1)10	"land"	9
1(1)11	"lien claimant"	10
1(1)12	"materials"	10
1(1)13	"mortgage"	11
1(1)14	"municipality"	11
1(1)15	"owner"	12
1(1)16	"payer"	13
1(1)17	"payment certifier"	14
1(1)18	"person having a lien"	14
1(1)19	"premises"	15
1(1)20	"price"	16
1(1)21	"services or materials"	19
1(1)22	"subcontract"	20
1(1)23	"subcontractor"	20
1(1)24	"supply of services"	21
1(1)25	"wages"	22
1(1)26	"worker"	22
1(1)27	"workers' trust fund"	22
1(1)28	"written notice of a lien"	23

SECTION	TOPIC	PAGE
1(2) & 1(3)	Owner's Agent for Purpose of Delivery	23-24
2	When Contract Substantially Performed	25-27
	PART I GENERAL	
3	Act Binds Crown	28
4	No Waiver of Rights	29
5	Contracts to Conform	30
6	Minor Irregularities	31
	PART II	
7	Owner's Trust	33-37
7(1)	- Amounts Received for Financing a Trust	33
7(2)	- Amounts Certified as Payable a Trust	34
7(3)	- Where Substantial Performance Certified a Trust	35
7(4)	- Obligations as Trustee	36

SECTION	TOPIC	PAGE
8	Contractor's and Subcontractors' Trust	37-39
8(1)	- Amounts Received a Trust	37
8(2)	- Obligation as Trustee	38
9	Vendor's Trust	39
9(1)	- Amounts Received a Trust	39
9(2)	- Obligations as Trustee	40
10	Payment Discharging Trust	40-41
11	Where Trust Funds may be Reduced	42
12	Set Off by Trustee	44
13	Liability for Branch of Trust by Corporations	44-46

PART III

THE LIEN

14	Creation of Lien	48
14(1)	- Who Entitled	48
14(2)	- No Lien for Interest	48
15	When Lien Arises	49
16	Where Lien Does not Attach to Premises	50

SECTION	TOPIC	PAGE
17	Limitation on Value of Lien	51-55
17(1)	- Amount of Lien	51-53
17(2)	- Set Off	53
17(3)	- Limit on Lien of Class	53
17(4)	- Special Liability of Municipality for dedicated Streets	54
18	Where Interest of Joint on Co-owner Subject to Lien	55
19	Where Landlord's Interest in Premises Subject to Lien for Leasehold Improvement	56-57
20	General Lien	58
21	Lien a Charge	59

PART IV

THE HOLDBACKS

22	The Holdbacks	60-62
22(1)	- Basic Holdbacks	60
22(2)	- Separate Holdback for Finishing Work	61
22(3)	- When Obligation to Retain Applies	62
23	Owner Personally Liable for Holdback	62

SECTION	TOPIC	PAGE
24	Payments That may be Made on a Contract or Subcontract	66
25	Payment on Certified Subcontract	67
26	Payment of Basic Holdback	69
27	Payment of Holdback for Finishing Work	71
28	Payment Made Directly to Person Having a Lien	71
29	Proper Payment Discharges Lien	72
30	How Holdback Not to be Applied	73

PART V

EXPIRY, PRESERVATION AND PERFECTION OF LIENS

31	Expiry of Unpreserved Liens	74-78
31(1)	- General	74
31(2)	- Contractor's Lien	74
31D3)	- Other Persons	75-78
31(4)	- Separate Liens When Ongoing Supply	78
31(5)	- Declaration of Last Supply	78

SECTION	TOPIC	PAGE
32	Substantial Performance of Contract	79-83
32(1)	- Rules Governing Certification	79
32(2)	- Content of Certificate	82
32(3)&(4)	- Where Liability for Failure on Refusal to Supply	82-83
32(5)	- How Certificate to be Published	83
33	Voluntary Certification of Completed Subcontracts	83-88
34	Preservation of Lien	88
34(1),(2) (3)&(4)	- How Preserved	88-92
34(5)	- Contents of Claim for Lien	92
34(6)	- Verification of Claim for Lien	94
34(7)	- Preservation of General Lien	95
34(8)	- Who May Join in Claim	95
35	Civil Liability for Grossly Exaggerated Lien Claims	96
36	Perfection of Liens	97-102
36(1)	- Must be Preserved	97
36(2)	- Time of Expiry Unless Preserved	98
36(3)	- How Perfected	99
36(4)	- Perfection by Sheltering	100
36(5)	- Perfection of Preserved General Lien	102
37	Expiry of Perfected Liens	102
38	Saving of Other Rights	103

SECTION	TOPIC	PAGE

PART VI

RIGHT TO INFORMATION

39	Rights to Demand Information	104-110
39(1)	- From Owner and Contractor re Contract and Bonds	104
39(2)	- From Vendor or Mortgagee re Mortgage	107
39(3)	- Workers' Trust Fund: Access to Payroll Records	108
39(4)	- Re Publication of Certificate of Substantial Performance	108
39(5)	- Liability for Failure or Refusal to Disclose	109
39(6)	- Court Enforcement	109
40	Cross-examination on Claim for Lien	110
41	Discharge of Lien Claim by Release	112
42	Discharge of General Lien Claim	113
43	Postponement of Lien Claim	114
44	Vacating Lien Upon Payment Into Court	114-119
44(1)	- without notice	114
44(2)	- upon payment of reasonable amount into court	116
44(3)	- where lien does not attach to premises	116
44(4)	- where general lien	116

SECTION	TOPIC	PAGE
44(5)	- reduction of amount paid into court	117
44(6)&(7)	- effective order	117-118
44(8)	- consolidation of motions	119
44(9)	- rules	119
45	Declaration of Expiration of Preserved Lien	121
46	Declaration of Expiration of Perfected Lien	123
47	General Power of Court to Discharge Lien	124
48	Discharge Irrevocable	126
49	Registration of Order of Discharge etc.	126

PART VIII

JURISDICTION AND PROCEDURE

50	Where Action to be Brought	128
51	Who May Try Action	129
52	Powers of Master	131

SECTION	TOPIC	PAGE
53	Court to Give Full Relief	132
54	Where Judge etc. Not Seized of Action	134
55	Pleadings	135
56	Defence & Effect of Default in Defence	136
57	Claims Which may be Joined	138
57(1)	- by plaintiff	138
57(2)	- by defendant	138
58	Third Party Proceedings	139
59	Parties to the Action	141
60	Reference to Master etc.	141
61	Carriage of Action	143
62	Obtaining a Date for Trial or Settlement Meeting	144
63	Conduct of Settlement Meeting	148
64	Judgment or Report	149
65	Personal Judgment	153
66	Right to Share Proceeds	153

SECTION	TOPIC	PAGE
67	How Sale to be Made	154-156
68	Application by Person Holding Trust	156
69	Procedure to be Summary	158

PART IX

EXTRAORDINARY REMEDIES

70	Appointment of Trustee etc.	160
71	Where Labour and Material Payment Bond in Effect	164

PART X

APPEALS

72	Stated Case	168
73	Appeal of Judgment or Report	169

SECTION	TOPIC	PAGE

PART XI

PRIORITIES

74	Enforcement of Lien Despite Default	172
75	Assignment of Lien Rights	173
76	Continuation of General Liens	173
77	Effect of Taking Security	174
78	Status of Lien Claimant	176
79	Priority of Lien Over Executions etc.	177
80	Priority of Lien Against Other Interests in Premises	178-193
80(1)	- general	178
80(2)	- building mortgage	179
80(3)	- prior mortgages etc./prior advance	180
80(4)	- prior mortgages etc./subsequent advance	181
80(5)	- special priority against subsequent mortgages	183
80(6)	- general priority against subsequent mortgages etc.	185
80(7)	- advances to trustee under Part IX	186
80(8)	- where postponement	187
80(9)	- saving	188

SECTION	TOPIC	PAGE
81	All Suppliers to a Person Comprise a Class	194
82	Priority Between and Within Classes	194
83	Worker's Priority	196
84	Subordination of General Lien Claim	198
85	Application of Insurance Proceeds	199
86	Distribution of Proceeds of Sale	200
87	Priority Between Trust Beneficiaries	201

PART XII

MISCELLANEOUS RULES

88	Costs	203
89	How Documents may be Given	206
90	Regulations	208
91	Repeal of Mechanics' Lien Act	209
92	Transitional	209
93	Short Title	209

APPENDICES

Appendix I	Table of Concordance: Construction Lien Act to Mechanics' Lien Act	210
Appendix II	Table of Concordance: Mechanics' Lien Act to Construction Lien Act	217
Appendix III	Table of Concordance: R.S.O. 1970, c. 267 to R.S.O. 1980, c.261	224

P A R T I

PART I

1. THE REASON FOR REFORM:

The justification for the mechanics' lien remedy was discussed in the Discussion Paper, and in general the Committee agrees with the observations in that regard which were contained in that document. The need for the types of remedies provided by the Mechanics' Lien Act, and the proposed Construction Lien Act, emanate from the complicated nature of contractual relationships within the construction industry, and the credit-granting practices which are an integral part of that industry. Ordinary contractual remedies are believed to be inadequate in the face of these phenomena.

Every construction project involves numerous tiers of contractual relations. A construction project may be viewed as a pyramid, with the owner standing at the apex of this pyramid. In the most simple form of contract organization, the owner hires a general contractor. This contractor, in turn, engages the services of a number of subcontractors. Each of these may hire further subcontractors, all of whom will be responsible for a specialized aspect of the project. At each step, the base of the pyramid is broadened, as the number of persons supplying services or materials to the improvement increases. While there are many variations of this pattern of organization, each variant contains these general features.

This pyramid results in a complex web of relationships. Each person arranges for the supply of specific services or materials to the improvement, knowing that those services and materials may well be supplied by persons other than the person with whom he deals. Conversely, each supplier

looks to those who have employed him for payment, knowing that the money for that payment must come from someone further up the pyramid. Because defective performance of any part of the contract work may result in a stoppage of payment, and the consequent flow of contract monies down the pyramid, a supplier of services and materials in a construction project may be greatly affected by the behavior of many people with whom he has no contractual relationship. While in theory the proper performance by a supplier of the work which he had agreed to do would entitle him to demand payment from the person to whom the supply was made, in practice the chances of such payment are largely contingent upon the continuous flow of contract monies from the owner down the pyramid.

A seemingly obvious solution to this problem would be for suppliers to insist upon payment in advance. However, the nature of construction work obviously makes this highly impractical from the point of view of the owner and the other payers on the contract or a subcontract. An owner is unlikely to be willing to pay for an improvement before it is made. Consequently, a supplier to a construction project is required to perform the work he is to do first, and then hope that he will be paid for it. Thus, he must supply his services on a credit basis. In the case of improvements to goods (such as the repair of a car), the common law has always provided a repairer with a lien right against any goods which he has repaired. His lien gives him the right to retain the repaired good until he has been paid for the work that he has done. In the case of repairs to real property, however, no such lien right was given by the common law. Instead, constructors were forced to depend upon the law of contract for their payment and were given no claim against the improved property itself. However, the eventual chances of a particular constructor obtaining payment for the work which he has done is often

contingent upon the ultimate state of accounts between persons with whom he has no contractual dealings, and the solvency of those persons. That solvency may be difficult for the supplier to determine, and may also fluctuate widely during the course of construction, as unexpected costs are encountered. Indeed, the financial stability of the owner -- to whom all suppliers must eventually look for payment -- will often deteriorate while the work on the project continues.

Ordinary contractual remedies appear ineffective in dealing with this web of relationships. If an owner refuses, or is unable to pay for the work that has been done on his premises, those at the bottom of the construction pyramid have no contractual claim against him. Furthermore, the common law gives constructors no priority over general creditors in the distribution of the owner's estate, should the owner become bankrupt, even though their work often results in the considerable enhancement of the value of the owner's estate. Since the nature of contruction work requires constructors to provide extensive credit, the failure to provide them with priority is not only unfair, but impractical.

The major objective underlying both the present Mechanics' Lien Act and the proposed Construction Lien Act is to provide remedies to construction suppliers that go beyond those provided by the ordinary law of contract. The legislation creates two types of statutory rights: lien rights and trust rights. The lien is a right to hold the owner's interest in the premises as security for the payment of all persons who have supplied services or materials to the making of the improvement. Should the owner be unable or unwilling to pay for the work that has been done, his interest in the premises may be sold. The owner can protect himself from having his

property sold by making all payments that he is obliged to make under his contract in accordance with the proper payment procedure set out in the Act. The trust rights isolate contract monies, and require them to be used for paying suppliers who have contributed towards the making of an improvement. By making these funds a trust, the suppliers to a payer are given protection in the event that the payer becomes insolvent, since the monies will not then form part of his estate. In addition, the trust rights permit the tracing of contract funds that are used for an improper purpose.

By providing these rights, the lien legislation facilitates the granting of credit within the construction industry. The protections afforded by the Mechanics' Lien Act have now become an integral factor in the provision of credit in that industry. Thus, the Act makes it easier for construction to take place, since it assures that credit will be made available. In addition, by providing a uniform regime of rights to all suppliers in the industry, that Act reduces both the costs of negotiating both construction contracts and sub-contracts, and also the uncertainties inherent in any complex system of contractual relationships.

For these reasons, there is virtual unanimity within the construction industry that the remedies provided by the Act should continue to be made available. They are viewed to be essential to the health of the industry. At the same time, however, there is also a general consensus within the industry that the present operation of the Mechanics' Lien Act is unsatisfactory, and that this area of the law is ripe for reform. It is widely believed that the present Act does not provide the protection which it was intended to afford. In addition, it is widely believed that the rights provided by the Mechanics' Lien Act are vague and ill-defined, and subject to

much confusion, and that the procedure for enforcing those rights is likewise confused. To remedy these problems, the Committee makes extensive recommendations for the reform of mechanics' lien law.

2. GENERAL RECOMMENDATIONS FOR REFORM

While almost all of the Committee's proposals are set out in detail in the Draft Act which forms Part II of this report, we wish to make a few recommendations for reform which cannot readily be stated in the form of draft legislation. These are:

1. That the remedies provided by Ontario's lien legislation continue to apply in the case of all improvements to real property, including consumer home improvements;

2. That part-time local masters be appointed for counties outside the Judicial District of York, to whom the trial of mechanics' lien actions may be referred;

3. That the Mechanics' Lien Act be repealed and replaced by the Draft Act contained in Part II of this report.

(a) Consumer Home Improvements

In the Discussion Paper, the Ministry of the Attorney General recommended that the remedies provided by Ontario's construction lien legislation continue to apply in the case of improvements to single-family private residences. We agree that the Act should continue to apply to such consumer home improvements. While it may be true that many private home-owners fail to retain the holdback, such a failure hardly amounts to a reason for exempting them from the Act.

If one agrees with the view that an owner should be liable to persons who have supplied services or materials to the improvement of his premises, and that the premises should stand as security for their payment, then it is difficult to justify the exemption of a class of owners from such

liability. While consumer home improvements invariably involve low-dollar amounts when compared to other forms of construction activity, such as major heavy construction projects, they may nevertheless involve substantial amounts of money. The suppliers of services and materials to the home improvement market are particularly vulnerable, because they are often small businesses which lack financial reserves. Furthermore, the effort to exempt such improvements from the scope of the Act would inevitably result in the drawing of arbitrary distinctions between apparently identical supplies of the same types of services and materials.

(b) Appointment of Part-time Local Masters

For many years, it has been the practice in the Judicial District of York to refer the trial of mechanics' lien actions to the masters of the Supreme Court. The reference of a trial is authorized under both the Mechanics' Lien Act and also the Judicature Act. A number of arguments can be advanced in favour of the continuation and extension of this practice. First, since it is customary within the master's office to assign one or two masters to handle all such references, that office has developed a great expertise in the trial of those actions, and also in the law which governs them and the subject matters which they concern. Such expertise not only expedites the trial of lien actions, it often helps facilitate out-of-court settlements. Second, as a collateral effect of its jurisdiction, the master's office has evolved an informal and flexible procedure well-suited to the trial of these actions. Third, the use of the reference procedure prevents lien actions from congesting the calendar of the Supreme Court itself. The trial of lien actions can be long and complicated, and may involve numerous parties.

Outside the Judicial District of York, it has long been the practice to have lien actions tried before the county court judges of the county in which the premises is situate. When trying these actions, they sit as local judges of the Supreme Court. The Committee believes that it is advisable to continue to vest jurisdiction for the trial of these actions in the local judges of the court. At the same time, however, the Committee is also of the opinion that it would be advisable to appoint part-time local masters for those counties in which there are a large number of lien actions. A reference procedure similar to the one in practice in Toronto could be used in those counties. These local masters might be drawn from retired members of the Bar who have acquired extensive expertise in mechanics' lien matters during their practice.

(c) Replacement of the Mechanics' Lien Act with a Wholly Rewritten New Act

In its Discussion Paper, the Ministry of the Attorney General noted the numerous problems of interpretation which have resulted from the repeated amendment of the Mechanics' Lien Act. The Ministry suggested that much of the litigation in respect to mechanics' lien claims seems to result from conflicting interpretations of the meaning of the legislation. From a lawyer's point of view, perhaps the most significant proposal contained in the Discussion Paper was to replace the existing legislation in its entirety with a new piece of legislation. This new statute would reflect modern industry and legal practice, conditions and terminology, and would be organized on a coherent pattern and be written in a style as simple as the subject matter would allow.

Our examination of the Mechanics' Lien Act has showed it to be very confusing, even to those who are familiar with it.

Much of this confusion appears to stem from the frequent amendment of the Act in the past, as a result of which there are numerous inconsistencies in terminology within the statute. In addition, many of the provisions of the Act have become exceedingly long and complicated. Both of these facts have made the Act highly ambiguous. Any further amendment of the Mechanics' Lien Act would be unthinkable unless that amendment was coupled with a complete revision of the statute.

3. SUMMARY OF SEPCIFIED PROPOSALS CONTAINED IN THE COMMITTEE DRAFT OF THE CONSTRUCTION LIEN ACT:

1. Extend the Special Priority Afforded to Workers' Lien Claims for Wages

The present Mechanics' Lien Act gives the liens of workers priority over the liens of other members of the same class to the extent of "30 days' wages". The meaning of this term has always been obscure, and for the purposes of clarification, the Discussion Draft proposed that the priority be set at "30 working-days' wages". We feel that even this amendment would leave some ambiguity. For example, it is unclear whether the priority would extend to any amount earned during the thirty-day period, or whether it would be limited to the normal earnings of a worker during a thirty-day period. To eliminat e this uncertainty, we propose that the priority be stated in terms of regular-time, working days' wages. Shift premiums, ovetime earnings and seasonal and other bonuses would be excluded.

The Committee believes that the proposed 30-day period is not sufficient. While an individual worker is unlikely to continue working on a project for 30 working days if he is not paid the protion of his wage that is payable to him on time, there will often be sizable arrears in payments to workers' trust funds. the proposed 30 working-day period is not sufficient to protect these funds. The Committee believes that the Act should protect primarily those persons who are least able to spread the risks, and who are least able to absorb the loss of a default in payment. The workers on a project are always among those who are least able to spread risks and absorb losses. Therefore, the Committee proposes that the special priority afforded to the lien claims of workers under the Act be extended to 40 regular-time working-days' wages. See subsection 83(1).

The Committee also endorses wholeheartedly the proposal contained in the Discussion Draft to permit workers' trust funds to enforce lien claims in respect of monetary supplementary benefits payable to the fund in respect of workers on an improvement. See subsection 83(2).

2. Reduction of the Rate of Holdback to 10% Instead of the Present 15% of the Price of Services and Materials Supplied to an Improvement

At present, the Mechanics' Lien Act requires an owner to withhold from payment 15% of the value of all work done on a construction contract during the period in which a lien may be preserved. Similar obligations are imposed on the payers on any subcontract. The Discussion Draft proposed the reduction of the rate of holdback to 10%. As might have been expected, this was one of the most controversial proposals contained in that document. Even within the Committee, there was long and intense discussion as to the merits of this proposal.

The Committee acknowledges that any reduction in the holdback will result in a reduction in the security afforded to construction suppliers by the holdback provisions of the Act. The holdback is often the only amount available to satisfy lien claims. Reduction in the rate of holdback will often mean that there will be less money available to satisfy these claims. For this reason, several members of the Committee do not recommend a reduction in the rate of holdback. However, the Committee as a whole has come to the conclusion that the rate of holdback should be reduced to 10 per cent. In the opinion of a majority of the Committee, the present rate of 15 per cent is unrealistically high, and has amounted to a severe hardship to contractors and subcontractors. A contractor or

subcontractor must normally pay his workers and material suppliers in full. The present rate of holdback often requires contractors and subcontractors to borrow extensively to obtain the necessary operating funds to enable them to pay for their materials and labour. Such borrowing can only be reflected in the costs of construction, and may result in an increase in the risks of an insolvency on the project. The possible insolvency of a contractor or principal subcontractor imperils the completion of the project, and the real security of everyone involved in its construction.

In the opinion of the majority of the Committee, a holdback rate of 10 per cent would provide adequate protection to the suppliers to an improvement, without endangering the health of the industry.

The Committee has considered the possibility of a split rate of holdback, under which the rate of holdback would be 15 per cent for the first $150,000 of the contract price, and 10 per cent on the balance of the contract price. Some members of the Committee believe that such a scheme might be successfully implemented, and point to the fact that a similar regime was in force under the Mechanics' Lien Act prior to the 1968-69 amendments. In the opinion of the majority of the Committee, however, this approach is not desirable. It might impose administrative problems. For instance, if the split rate of holdback were not extended to the holdback on subcontracts, the contractor might be required to pay his subcontractors more than he was paid by the owner. If the split holdback were extended to subcontracts, the situation would often arise in which more money would be withheld by the contractor from his subcontractors, than was being withheld from the contractor by the owner. Since one major purpose of

the holdback is to protect subcontractors in the event of the insolvency of the contractor, such an approach does not seem particularly practical.

The Committee has considered and expressly rejects the reduction of holdback to 7.5% which was recently enacted in Manitoba. Reduction of the holdback to this level would substantially erode the protection it affords to subcontractors, workers and material suppliers of an insolvent contractor or subcontractor. Where the contractor defaults in the performance of the contract, the holdback may be the only money available to satisfy the lien claimants. Every reduction in the holdback, including the reduction of 15 to 10% recommended by this Committee, makes it less worthwhile to pursue a lien claim, since the amount available to satisfy the claim is also reduced. However, reduction of the holdback below 10% in the opinion of the Committee, would reduce the protection afforded by the Act below an acceptable level.

3. Clarification of the Trust Provisions

The Discussion Draft contained a number of provisions designed to convert the trust provisions of the Act into a separate and independent remedy from the lien. In essence, they would have permitted a supplier to an improvement to interrupt the flow of contract monies down the pyramid by way of a trust claim. In addition, a trustee would have been required to withhold payment from any person whom he was liable to pay where he had reasonable grounds to believe that a payment to that person would have resulted in a breach of trust under the Act by that person. These provisions were largely an outgrowth from some recent case law in respect to the trust provisions of the Mechanics' Lien Act.

The Committee is sympathetic to the belief implicit in the Discussion Draft, that the Act should provide as much protection as possible to the suppliers to an improvement. We believe, however, that the Act should provide only as much protection as is practical; and we do not believe that either the trust provisions of the Discussion Draft, or case law upon which they are based, are practical. Put simply, the proposed trust provisions would have put all payers in a very difficult position. Each time a payer made a payment on a contract or subcontract, he would have had to decide whether he had reasonable grounds to believe that a breach of trust might result. If he was aware of such grounds, he would have been required to refrain from payment. The Committee believes that there are many cautious payers in the construction industry, and wonders whether these payers would ever be willing to make a payment, knowing that they might risk further liability if they did so. At the very least, the interpleader provisions of the Discussion Draft would most likely have led to an endless series of court applications.

At the same time, there does not appear to be any practical reason for permitting a supplier to interrupt the flow of contract monies by giving notice of a breach of trust. Any supplier who wishes to protect himself may preserve a lien and give written notice of that lien to the owner. In the event that this is done, there are clear steps available to the owner to protect himself and the supplier, and also to reopen the flow of payment. There is no need for a second method of interrupting payment.

The Committee believes that while the trust provisions of the Act serve a useful purpose, they are in need of clarification. These provisions prevent contract monies from being misappropriated, and protect those monies from the claims of other creditors in the event of a bankruptcy. The Committee believes that the Act should state specifically the obligations of a trustee and should outline how those obligations are to be discharged. In the opinion of the Committee, the obligations of a trustee under the Act are no more and no less than to use the contract monies which are paid to him to pay those who supply services or materials to him in respect to an improvement for those services and materials. However, the Committee acknowledges that there may be occasions where a person may believes that he has come into the possession of trust funds, yet he is unsure of his precise obligations that result from this. A typical situation, is where a private receiver appointed under a debenture comes into possession of money that he believes to be impressed with a trust. In such circumstances, it would be advantageous if the law permitted an application to count for directions as to the rights and obligations of all parties interested in the trust. Section 68 of the Committee Draft provides for such a right.

(4) Clarification of the Lien Provisions

The Committee generally endorses the restatement of the lien provisions contained in Part III of the Discussion Draft. The Committee has proposed some slight modifications of these provisions in an effort to state the law in as precise terms as possible. The Committee applauds the proposal to extend the liability of owners in the case of improvements made to a premises that is owned in joint or co-tenancy (see section 18), and also the new right to a lien in the case of subdivision road construction [see subsection 16(3)]. The Committee notes with approval the decision to provide a similar right in the new Manitoba legislation.

(5) Securing the Holdback

Perhaps the most controversial proposal contained in the Discussion Draft was the proposal to require that the holdback required to be retained by the owner be deposited into a joint trust account, to be held in the names of the owner and contractor, on any contract where the value of the work to be done exceeded $150,000. The Committee strongly recommends the rejection of this proposal.

In the opinion of the Committee, the costs of the joint trust account proposal would far exceed its benefits. The scheme would have provided no practical protection on contracts for less than $150,000, yet it is often on these contracts that the holdback is least secure. The scheme would have imposed a very high cost on the industry. The owner would often have had to borrow the money to put into the joint trust account and in many cases, this money would have been borrowed from the same bank or trust company in which it was deposited. While the

availability of interest on the joint trust account might have eventually led to a reduction in the price of contracts, that reduction would have never fully off-set the cost of the additional borrowing which the scheme would have required. In addition, the scheme would have imposed significant administrative costs. A separate joint trust account would have been required for each contract. In the case of many large owners, they would have been required to open hundreds of such accounts every year. The cost of opening, controlling and closing these accounts would have been very high. But, ironically, these are precisely the same owners who are the least likely to default in maintaining the holdback. As a result, the total cost of this proposal would likely have greatly exceeded the cost which the risk of default on the holdback forces on the industry. Finally, the scheme wasincompatible with some common forms of project organization, such as construction and project management. Thus, it would have severely restricted the ability to use these systems of organization. This might also have resulted in further increases in the cost of construction, since the efficiencies inherent in these forms of organization would have thus been made unavailable.

However, the Committee is of the opinion, that there is a need to secure the holdback. We agree that there have been numerous occasions on which lien claimants have found the owner's interest in the premises to be insufficient to satisfy claims in respect to the holdback. In the experience of the Committee, this situation normally arises as a result of erosion of the ower's equity in the premises as a result of the accumulation of arrears in interest, where the owner defaults in the payment of a mortgage. Since the relative priority between mortgages and the liens are the cause of the problem, we believe

that the best way to resolve the problem is to adjust those relative priorities so as to protect the lien claimant's rights in the premises. To do this, we propose to give lien claimants priority to the extent of any deficiency in the holdback over every mortgagee who takes a mortgage for the purpose of securing the financing of the improvement ("building mortgage"), and also over any mortgagee who acquires an interest in the premises subsequent to the commencement of the making of the improvement, irrespective of the purpose of that mortgage.

Earlier in our report, the Committee advanced the proposition that the Act should primarily protect those who were least able to spread risks and to absorb the losses resulting from a default in payment. Our proposal in respect to the restructuring of priorities between mortgagees and lien claimants follows this theme. Mortgagees are usually better able to spread the risk of a default than are the suppliers to an improvement. The bargaining strength of mortgagees vis-a-vis an owner will enable then to obtain alternate security from owners to compensate them for any additional risks which they may run as a result of their reduced priority. To the extent that no such security is available, the additional risk to mortgages may be compensated for in an increased rate of mortgagees, but this increase in cost will likely reflect accurately the cost which the risk of an owner's insolvency imposes upon the industry. It is not unreasonable to transfer the cost of insolvency back to owners, since they are the sources of the risk. Where the financial stability and strength of the owner suggests that there will be no additional risk to the mortgagee, the owner will probably face no increase in the price of his mortgage. An additional benefit of this scheme is that it should result in little administrative cost, since it imposes no burden on the industry above those which are already implicit in the mortgage process.

Full details of the Committee's proposal can be found in the notes under section 80 in Part XI of the report.

(6) Clarification of the Time of Expiration of Lien Rights and the Time when the Holdbacks May be Released

The questions of when lien rights expire and when the holdback may be safely released by the owner and the payers on the contract and on subcontracts are fundamental to the operation of the Act. However, these questions are not easily answered under the existing legislation. The Committee agrees with the authors of the Discussion Paper in their suggestion that these matters are greatly in need of clarification. We also accept their proposal that there should be a single final cut-off date for the preservation of liens in respect of the holdback, for the supply of services and materials before the date the contract is substantially performed. The owner should be permitted to release the holdback once that date is past, and all liens that may be claimed against that holdback have expired or have been satisfied, discharged or provided for by way of payment into court. However, the Committee has proposed a large number of modifications to the proposals contained in the Discussion Draft, in the hopes of making the Act operate more smoothly.

The Discussion Draft would have allowed sixty days for the preservation of a lien claim, followed by a further sixty days for the perfection of that claim. In the opinion of the Committee, the sixty-day periods were inordinately long. Nevertheless, the Committee agrees that the present thirty-seven day period for preserving a lien does not allow many lien claimants sufficient time to decide whether it is necessary to preserve their liens. The Committee suggests that a forty-five day period would be a realistic alternative to the sixty-day proposal found in the Discussion Draft.

(7) Vacating and Discharging Lien Claims

The provisions of the Mechanics' Lien Act dealing with the vacating and discharge of lien claims are highly ambiguous and confusing. In the Discussion Draft, an unsuccessful effort was made to restate these provisions with greater exactitude. The Committee has redrafted these provisions in an effort to make their application clear.

(8) Rights to Information

The Discussion Draft proposed to grant wider rights to information than are available at present under the Mechanics' Lien Act. For example, it would have been possible to compel disclosure of subcontracts, and persons would have been able to obtain any information to which they were entitled, irrespective of whether they had preserved a lien at the time when their request for information was made. In the experience of the Committee, there is little compliance with the present rights to information provisions found in the Mechanics' Lien Act. Any expantion of these provisions would be unlikely to result in increased compliance.

In our opinion, the problem with the existing provisions of the Mechanics' Lien Act is that they require the disclosure of too much information. Much of this information is likely to be irrelevant to the conduct of a lien action. The technical details connected with a contract, for example, can have little relevance to the decision of whether or not to preserve a lien. However, since they are part of the contract, the Mechanics' Lien Act requires their disclosure where it is requested. A contractor or subcontractor may be reluctant to disclose the full terms of his contract or

subcontract to one of his suppliers. Often he will be in competition with that supplier for work on other projects. Disclosure of such information may prejudice his chances of competing successfully with his supplier on other projects.

We suggest that the Act should require disclosure of only that information which is pertinent to the decision of whether or not to preserve a lien claim or to pursue a lien action. These provisions should be reinforced with workable enforcement mechanisms. We have redrafted Part VI of the Construction Lien Act in an effort to implement this proposal.

(9) Reform Enforcement Procedure

The Committee recommends a number of modifications to the procedural provisions contained in the Discussion Draft. Our most significant recommendations are in respect to the joinder provisions of the Discussion Draft. The Discussion Paper recommended very wide rights to join a variety of proceedings into a lien action. Trust claims could be joined as of right, as could any other personal claim related to the improvement. Wide rights to counter and cross-claim were given to defendants.

In the opinion of the Committee, the joinder provisions of the Discussion Draft would have greatly complicated the trial of lien actions. While the court was given a liberal power to order severence, a great deal of time might have been wasted in the bringing of severence applications. The Committee proposes new joinder provisions that will restrict joinder to those claims, cross-claims and counterclaims, which are clearly relevant to the lien claim. Under section 58, third-party claims for contribution and indemnity may be joined with the lien action, but only with leave of the court.

The Committee was of the opinion that trust claims should not be tried in a lien action. The complexity of these claims militates against their joinder into a lien proceeding. In addition, they will usually be tracing actions, and involve a number of parties and issues not involved in a lien action.

The Committee also proposes a number of provisions designed to curb many of the abuses of the lien procedure that are, unfortunately, far too commonplace under the present Act. For example, a default in filing a defence will now result in pleadings being noted closed against the defaulting defendant. In addition, the right to cross-examine on a lien claim, should defer the making of grossly excessive claims.

(10) Clarification of Priorities

Except for the changes noted earlier, in respect to the priority of the lien to the extent of deficiencies in the holdback over certain mortgages, and also the extended priority of workers' claims for wages, the Committee Draft essentially reflects the recommendations of the Discussion Draft in respect to priority.

P A R T I I

AN ACT TO REVISE THE MECHANICS' LIEN ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.- (1) In this Act,

Section 1

Section 1 is the major definition section of the Act. The definitions contained in this section have been revised from those which appear in the Discussion Draft and the Mechanics' Lien Act, to reflect the Committee's recommendations in respect to the substantive provisions of the Act.

In preparing this Report, the Committee has adopted an approach similar to that employed in the preparation of the Discussion Draft, namely the simplification of the Act through the use of a large number of terms of art. The principal function of a definition section, such as section 1, is to clarify the meaning of a statute by assigning specific meanings to the key words and phrases used in the Act. Once so defined, these words become terms of art; they are convenient short forms, carrying with them the meaning which has been ascribed to them in the definition section.

Subsection 1(1).....

1. "action" means an action under Part VIII;

Paragraph 1

This definition replaces the definition of "action" found in paragraph 1(1)1 of the Discussion Draft The differences between these two definitions reflect the changes that the Committee recommends be made to procedural provisions of the Discussion Draft.

The definition of "action" found in paragraph 1 is intended to distinguish that term when it is used in this Act from the definitions found in the Judicature Act and the Supreme Court Rules of Practice. Part VIII of the Act sets out a special procedure to govern the conduct of proceedings to assert lien claims. A few other types of claims may be joined into the trial of a lien action. For example, sub-section 57(1) permits a lien claimant to a claim against his payer for breach of contract with his action to enforce his lien claim. Clause 57(2)(a) permits a defendant to counterclaim against any person who named him as a defendant. Section 58 permits third party proceedings with leave of the court. Reference should be made to the Explanatory Text to Part VIII for further details in respect to the procedural provisions of the Act.

Discussion Draft Provision:

1. "action" means an action to enforce a lien claim and includes an action to enforce a trust or other claim that is joined with an action to enforce lien claim;

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
2. "construction trade newspaper" means a newspaper having circulation generally throughout the province, that is published no less frequently than on all days except Saturdays and holidays, and in which calls for tender on construction contracts are customarily published, and that is primarily devoted to the publication of matters of concern to the construction industry.	Paragraph 2 This is a new definition. The Committee proposes that copies of any certification of substantial performance be published in a construction trade newspaper, so that all persons who are affected by the certification of the substantial performance of a contract will be able to determine the date of certification. To facilitate this system, the construction trade newspaper is required to publish these notices in accordance with regulations made under section 90. Under section 31 of the Committee Draft, all liens arising under the contract in respect of service on materials supplied to the improvement prior to the date certified to be the date of substantial performance will expire no later than 45 days after the date of publication.	
3. "contract" means the contract between the owner and the contractor, and includes any amendment to that contract;	Paragraph 3 In the Mechanics' Lien Act, it was often unclear whether the word "contract" referred only to agreements between the owner and the contractor, or whether it encompassed subcontracts. This ambiguity has often led to unfortunate results. For example, in some cases, it has been held that the doctrine of substantial performance applies to subcontracts. However, it is unlikely that this was intended when the substantial performance provisions of the Mechanics' Lien Act were introduced.	Discussion Draft Provision: 2. "contract" means the contract between the owner and the contractor;

Subsection 1(1).....

In the Committee Draft, the word "contract" is used exclusively to refer to an agreement between the owner and a contractor. The word "subcontract" is used to denote agreements between the contractor and a subcontractor, or between any two subcontractors.

The words "and includes any amendment to that contract" have been inserted into the definition for the purposes of clarity. It should be borne in mind that an amendment to a contract would not include a supplemental agreement, which is a separate contract.

4. "contractor" means a person contracting with or employed directly by the owner or his agent to supply services or materials in respect of any improvement;

Paragraph 4

This provision is substantially identical to section 1(1)(b) of the Mechanics' Lien Act. Minor changes have been made to the definition to ensure consistency with other provisions of the Act. It is customary for construction projects to be organized upon what is known as a pyramid pattern. An owner will hire a contractor to make an improvement to his property. The contractor, in turn, will hire a number of specialist subcontractors, each of whom will work on a particular aspect of the project. Only the contractor has direct contractual relations with the owner. The definition of "contractor" contained in the Committee Draft makes it clear that the term "contractor"

Discussion Draft Provision:

3. "contractor" means a person contracting with or employed directly by the owner or his agent for the supplying of services or materials in respect of any improvement;

Mechanics' Lien Act Provision:

(b) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or the placing or furnishing or materials for any of the purposes mentioned in this Act;

Subsection 1(1).....

refers only to a person having direct contractual relationship with the owner.

5. "court" means the Supreme Court of Ontario;

Paragraph 5

This definition is the same as the definition of "court" found in the Discussion Draft. Where a jurisdiction is conferred upon the "court" under this Act, that jurisdiction may be exercised only by the Supreme Court. It should be noted however, that many of the powers of the court in respect to interlocutory motions and proceedings may be disposed of by a master; in addition, under section 60 the trial of actions may be referred to these officers in certain cases. Original trial jurisdiction is conferred by section 51 on local judges of the court.

Discussion Draft Provision:

4. "court" means the Supreme Court;

Paragraph 5 of the Discussion Draft (deleted)

The Committee recommends the deletion of this definition as unnecessary. The meaning of the term "cross-claim" is apparent from section 57, which provides for the bringing of cross-claims within an action under Part VIII.

Discussion Draft Provision:

5. "cross-claim" means a claim by a defendant against any other person except the person who named him as a defendant;

Subsection 1(1).....

6. "Crown" includes a Crown agency to which the Crown Agency Act applies;

Paragraph 6

This provision is identical to clause 1(1)(c) of the Mechanics' Lien Act and paragraph 1(1)6 of the Discussion Draft. The purpose of this provision is to make it clear that the special provisions of the Act respecting liens arising from the improvement of Crown property also apply to improvements to property belonging to a Crown agency.

Discussion Act Provision:

6. "Crown" includes Crown agencies to which the Crown Agency Act applies;

Mechanics' Lien Act Provision;

(c) "Crown" includes Crown agencies to which the Crown Agency Act applies;

Paragraph 7 of the Discussion Draft (deleted)

The Committee recommends that this definition be deleted as unnecessary. The meaning of the term "general lien" is clear from section 20, of the Act, which provides for such liens.

Discussion Draft Provision:

7. "general lien" means a single lien arising from a single contract or subcontract but attaching to more than one premises belonging to the same owner;

7. "holdback" means the 10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by Part IV;

Paragraph 7

This is a new definition. The term "holdback" is one well-known in the construction industry and in the practice of mechanics' lien law. However, it was never used in the Mechanics' Lien Act itself. In keeping with the general policy of the Committee that the terminology used in the new Act should reflect industry practice and terminology, the Committee has used the term "holdback" throughout the Act rather than the equivalent phrase found in the Mechanics' Lien Act, "the percentage required to be retained".

The definition of the term "holdback" has been modified from the definition that appeared in the Discussion Draft, by the removal of the reference to the joint trust account. This change has been made in consequence to the Committee's recommendation to delete the joint trust account provisions from the Act.

Discussion Draft Provision:

8. "holdback" means the 10 per cent of the volume of the services or materials supplied under a contract or subcontract required to be withheld from payment by this Act, and, where this sum is required to be deposited into a joint account, includes any interest accruing thereon;

Subsection 1(1).....

8. "improvement" means,
   i. any alteration, addition or repair to, or
   ii. any construction, erection or installation on,

   any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning;

Paragraph 8

Paragraph 8 replaces paragraph 1(1)9 of the Discussion Draft and section 6(1) of the Mechanics' Lien Act. The definition of the term "improvement" has been redrafted to make it clear which types of work on land give rise to a lien.

The purpose of the Act is to protect those who contribute their services or materials towards the making of an improvement to a premises. The types of work which constitute an improvement are set out in clauses a and b. While the definition of "improvement" is broad, the Committee has attempted to draft it in such a way that it will be clear that the lien created by the Act applies only in the case of the construction and building repair industries.

Discussion Draft Provision:

9. "improvement" includes anything made, constructed, erected, altered, fitted, repaired or added to any land, building, structure, works, or appurtenances to any of them, or any work done to or in respect of a premises for the purpose of enhancing its value, including the demolition or removal of any building or structure, or part thereof, on the premises, and "improved" has a corresponding meaning;

Mechanics' Lien Act Provision:

6.-(1) Unless he signs an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect

Subsection 1(1).....

		of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.
9. "interest in the premises" means an estate or interest of any nature, and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under the lands or premises;	Paragraph 9 This provision is substantially similar to clause 1(1)(d) of the Mechanics' Lien Act. The lien created by the Act attaches to the interest of the owner in the premises. It will not attach to any interest which the Crown may have in the premises: see section 16.	Discussion Draft Provision: 10. "interest in the premises" means an estate of any nature and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		Mechanics' Lien Act Provision: (d) "estate or interest in land" includes a statutory right given or reserved to the Crown to enter any lands or premises of any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;
10. "land" includes any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement;	Paragraph 10 This is a new definition, inserted by the Committee to ensure that the term "land" where used throughout the Act will be taken to include any fixture on the land, other than the improvement Note, however, that the term "premises" includes both "land" as defined in this paragraph and also the improvement. The term "land" is used in the Act where it is necessary to describe the property on which the "improvement" is made, but to exclude the actual improvement itself from that reference. Conversely, the term "premises" is used where it is intended to describe both the improvement and the property on which it is situate.	

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
11. "lien claimant" means a person having a preserved or perfected lien;	Paragraph 11 In both the Discussion Draft and the Committee Draft, the term "lien claimant" has been used to refer to a person who has preserved or perfected a claim for lien. See also paragraph 18, which defines the term "person having a lien".	
12. "materials" means every kind of moveable property, i. that becomes, or is intended to become, part of the improvement, or that is used directly in the making of the improvement, or that is used to facilitate directly the making of the improvement, ii. that is equipment rented without an operator for use in the making of the improvement;	Paragraph 12 The scope of the term "materials" has never been clear under the Mechanics' Lien Act. In deciding cases under that Act, the courts have attempted to distinguish between supplies of material which give rise to a lien, and those supplies of material which are too remote to the making of the improvement to give rise to a lien. The distinction between these two types of material supply has never been clear. Indeed, many of the cases appear to conflict with each other. The Committee believes that the rights created by the Act should not be extended to those who have no direct connection with the construction process. The purpose of paragraph 12 is to establish a nexus test to assist the courts in determining whether a given supply of materials will give rise to a lien.	Discussion Draft Provisions: 11. "materials" includes every kind of movable property, (i) that becomes, or is intended to become, part of the improvement or that is used in the of the improvement or to facilitate its making, or (ii) that is equipment rented without an operator for use in making the improvement; Mechanics' Lien Act Provision: (e) "materials" includes every kind of moveable property; 6.-(5) A person who rents equipment to an owner, contractor or subcontractor for use on a contract site shall be deemed for the purposes of this Act to have performed a service for which he has a lien for the price of the rental of the equipment used on the contract site, limited, however, in amount to the sum justly owed and due to the person entitled to the lien from the owner, builder, contractor or subcontractor in respect of the rental of the equipment.

Subsection 1(1).....

13. "mortgage" includes a charge and "mortgagee" includes a chargee;

Paragraph 13

Paragraph 13 is the same as paragraph 12 of the Discussion Draft. No similar provision is found in the Mechanics' Lien Act. It is inserted for the purpose of clarity. Under the Land Titles Act, one of the two systems of land registration in operation in Ontario, a mortgage is described as a charge. The purpose of paragraph 13 is to ensure that the term "mortgage" will be taken to include a reference to a charge under the Land Titles Act, where the term is used in the Construction Lien Act.

Discussion Draft Provision:

12. "mortgage" includes a charge and "mortgagee" includes a chargee;

14. "municipality" means a municipality as defined in the Municipal Affairs Act or a metropolitan, regional or district municipality, or a local board thereof;

Paragraph 14

This is a new provision proposed by the Committee to ensure that the term "municipality" is given the same meaning throughout the Act. Under the Mechanics' Lien Act, the term appears to have the meaning that is given under paragraph 14, although this is by no means clear.

Subsection 1(1).....

15. "owner" means any person having an interest in a premises at whose request and,
    i. upon whose credit, or
    ii. on whose behalf, or
    iii. with whose privity or consent, or
    iv. for whose direct benefit,
an improvement is made to the premises;

Paragraph 15

This is a new definition of the term "owner" and replaces the definitions of that term found in paragraph 1(1)13 of the Discussion Draft and in clause 1(1)(f) of the Mechanics' Lien Act. The meaning of the term "owner" has always been somewhat opaque. The Committee has redrafted the provision to clarify its meaning. The reference to the Crown, municipal corporations and railways that was found in the earlier versions of this definition has been deleted as unnecessary. The Act expressly binds the Crown, and will automatically extend to railways and municipal corporations. The word "includes" has been replaced by "means" since the definition has always been intended to be exhaustive rather inclusive. The use of the word "includes"was inappropriate.

The Committee recommends that the reference to "any person who acquires an interest in the premises through the owner" (which is found in paragraph 1(1)13 if the Discussion Draft) be removed from the definition. To include these persons within the scope of the term "owner" would be inconsistent with the priority provisions of the Act. Section 80, contains exhaustive provisions specifying the priority between lien claimants and other persons who acquire an interest in the premises subsequent to the commencement of the making of the improvement.

Discussion Draft Provision:

13. "owner" includes any person, including the Crown and a municipal corporation, having any interest in the premises, and at whose request, and,
    (i) upon whose credit, or
    (ii) on whose behalf, or
    (iii) with whose privity or consent, or
    (iv) for whose direct benefit,
an improvement to the premises is made and includes any person who acquires an interest in the premises through the owner after the services or materials in respect of which the lien is claimed have commenced to be supplied.

Mechanics' Lien Act Provision:

(f) "owner" includes any person and corporation, including the Crown, a municipal corporation and a railway company, having any estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and,
    (i) upon whose credit, or
    (ii) on whose behalf, or
    (iii) with whose privity or consent, or
    (iv) for whose direct benefit,
work is done or materials are placed or furnished and all persons claiming

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		under him or it whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials placed or furnished have been commenced to be placed or furnished.
16. "payer" means the owner, contractor or subcontractor who is liable to pay for the materials or services supplied in respect of any improvement under a contract or subcontract;	Paragraph 16 Paragraph 16 is substantially similar to paragraph 15 of the Discussion Draft. The term "payer" replaces the term "the person primarily liable upon a contract," which was found in numerous sections of the Mechanics' Lien Act. Aside from being cumbersome, the term "person primarily liable" was also legally incorrect. The term "payer" is concise, and clearly identifies the contractual party who is being described.	Discussion Draft Provision: 15. "payer" means the owner, contractor or subcontractor liable to pay money for the materials or services supplied in respect of an improvement under a contract or subcontract;

Subsection 1(1).....

17. "payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract;

Paragraph 17

Paragraph 17 is indentical to paragraph 14 of the Discussion Draft. Provisions of this nature also appear in several sections of the Mechanics' Lien Act. On major construction projects, it is now customary for the payments under a contract to be made upon the certificate of a project supervisor, such as an architect or engineer.

Discussion Draft Provision:

14. "payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract;

Mechanics' Lien Act Provision:

12-(2) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and thirty-seven days have elapsed after a certificate issued by that architect, engineer, or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 15 per cent of the subcontract price or, if there is no specific subcontract price, by 15 per cent of the actual value of the work done or materials placed or furnished under that subcontract, but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act.

18. "person having a lien" includes both a lien claimant and a person with an unpreserved lien;

Paragraph 18

The term "person having a lien" is used throughout the Act to include both lien claimants and those who have yet to preserve their liens.

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
19. "premises" includes, i. the improvement, ii. all materials supplied to the improvement, and iii. the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;	Paragraph 19 The lien created by this Act attaches to the owner's interest in the premises. Paragraph 19 defines the meaning of the terms "premises". It is the same as paragraph 16 of the Discussion Draft, and is derived from subsection 6(1) of the Mechanics Lien Act.	Discussion Draft Provision: 16. "premises" includes, (i) the improvement, (ii) all material supplied to the improvement, and (iii) the land occupied by the improvement, or enjoyed therewith. or the land upon or in respect of which the improvement was done or made. Mechanics' Lien Act Provision: 6.-(1) Unless he signs an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the

Subsection 1(1).....

		lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.
20. "price" means the contract or subcontract price, i. agreed upon between the parties, or ii. where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract;	Paragraph 20 Paragraph 20 is substantially the same as paragraph 17 of the Discussion Draft. Like many of the terms found in section 1, it is derived from section 6(1) of the Mechanics' Lien Act and also section 12(1) of that Act.	Discussion Draft Provision: 17. "price" means the contract or subcontract price, (i) agreed between the parties, or (ii) where no specific price has been agreed upon between them, the actual value of the services or materials or both that have been supplied to the improvement under the contract or subcontract. Mechanics' Lien Act Provision: 6.-(1) Unless he signs an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any land,

Subsection 1(1).....

building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

12.-(1) In all cases, the person primarily liable upon a contract under or by virtue of which a lien may arise shall, as the work is done or the materials are furnished under the contract, retain for a period of thirty-seven days after the completion or abandonment of the work done or to be done under the contract 15 per cent of the value of the work and materials actually done, placed or furnished, as

Subsection 1(1).....

mentioned in section 6, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated upon evidence given in that regard on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work or materials.

Paragraph 1(1)18 of the Discussion Draft (deleted)

The Committee has redrafted section 16 of the of the Act in an effort to do away with the term "public work". This term has always been ambiguous and appears to be unnecessary.

Discussion Draft Provision:

18. "public work" means the property of the Crown, including all premises in which the Crown has an interest and all improvements carried out at the expense of the Crown or for which any public money was appropriated by the Legislature, other than an improvement for which money was appropriated as a subsidy only;

Mechanics' Lien Act Provision:

(g) "public work" means the property of the Crown and includes land in which the Crown has an estate or interest, and also includes all works and properties acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Crown, or for the acquisition, construction, repairing, equipping, extending, enlarging or improving of which any public money is appropriated by the Legislature, but not any work for which money is appropriated as a subsidy only;

Subsection 1(1).....

	Paragraph 19 of the Discussion Draft (deleted) In light of the Committee's recommendation to delete the joint trust account provisions found in section 24 of the Discussion Draft, the definition of "share of accrued interest" found in paragraph 1(1)19 of the Discussion Draft has been deleted as no longer necessary.	Discussion Draft Provision: 19. "share of accrued interest" means a rateable share of any interest accrued and due payable upon the holdback by the bank, trust company or other financial institution in which the holdback has been deposited, but calculated without regard to, (i) the length of time the share of any person in the holdback has actually been retained from him, or (ii) any fluctuation in the rate of interest paid during the period of retention by the bank, trust company or other financial institution in which the holdback was deposited.
21. "services or materials" includes both services and materials;	Paragraph 21 This is a new definition that has been inserted by the Committee out of an abundance of caution. Its purpose is to make it clear that where a provision in the Act refers to a person who supplies services or materials it will be taken to include a reference to a person who supplies both services and materials. This definition should not be construed as an implicit restriction upon the scope of the word "or", where it is used in other sections of the Committee Draft.	

Subsection 1(1).....

22. "subcontract" means any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement;

Paragraph 22

The definition of "subcontract" has been modified slightly from the definition that appeared in paragraph 20 of the Discussion Draft. These changes have been made to achieve greater harmony between this definition and the definition of "subcontractor" in paragraph 22, and also to eliminate the use of the term "contract" in the definition. Since the word "contract" is defined in paragraph 3 to mean an agreement between the owner and a contractor, it is not correct to define a subcontractor as a "contract between the contractor and a subcontractor". See the notes under paragraph 3.

Discussion Draft Provision:

20. "subcontract" means any contrtact between the contractor and subcontractor or between two or more subcontractors.

23. "subcontractor" means a person not contracting with or employed by the owner or his agent but who supplies services or materials to the improvement under an agreement with the contractor or under him with another subcontractor;

Paragraph 23

This definition is substantially the same as paragraph 21 of the Discussion Draft and clause 1(1)(h) of the Mechanics Lien Act. See notes under paragraph 4.

Discussion Draft Provision:

21. "subcontractor" means a person not contracting with or employed directly by the owner for the supplying of services or materials but who contracts with or is employed by a contractor or under him, for another subcontractor;

Mechanics Lien Act Provision:

(h) "subcontractor" means a person not contracting with or employed directly by the owner or his agent for any of the purposes mentioned in this Act, but contracting with or employed by a contractor or, under him, by another subcontractor.

Subsection 1(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
24. "supply of services" means any work done or service performed upon or in respect of an improvement, and includes, i. the rental of equipment with an operator, and ii. where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner's interest in the land, and a corresponding expression has a corresponding meaning;	Paragraph 24 This definition replaces paragraph 22 of the Discussion Draft and subsection 1(2) of the Mechanics' Lien Act. Changes have been made to ensure consistency of terminology. In addition, subparagraph (ii) has been inserted to make express provision in respect to to the lien rights of architects, engineers and others who prepare the designs and specifications for improvements that are never actually constructed. In order to obtain a lien for the preparation of such plans, the plans themselves must enhance the value of the land on which the improvement was to have been constructed.	Discussion Draft Provision: 22. "supplying of services" means the doing of work or performance of a service upon or in respect of an improvement, including the rental of equipment with an operator; Mechanics' Lien Act Provision: 1.-(2) In this Act, the expression "the doing of work" includes the performance of a service, and corresponding expressions have corresponding meanings. 6.-(5) A person who rents equipment to an owner, contractor or subcontractor for use on a contract site shall be deemed for the purposes of this Act to have performed a service for which he has a lien for the price of the rental of the equipment used on the contract site, limited, however in amount to the sum justly owed and due to the person entitled to the lien from the owner, builder, contractor or subcontractor in respect of the rental of the equipment.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		Subsection 1(1).....
25. "wages" means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement;	Paragraph 25 This provision is virtually the same as section 1(1)(i) of the Mechanics' Lien Act and is identical to paragraph 23 of the Discussion Draft. The Committee Draft gives special priority to lien claims by workers or workers' trust funds in respect to wages.	Discussion Draft Provisiion: 23. "wages" means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits whether by statute, contract or collective bargaining agreement; Mechanics' Lien Act Provision: (i) "wages" means the money earned by a workman for work done by time or a piece work, and includes all monetary supplementary benefits, whether by statute, contract or collective bargaining agreement;
26. "worker" means a person employed for wages in any kind of labour;	Paragraph 26 The definition of worker is similar to the definition found in paragraph 1(1) 24 of the Discussion Draft, clause 1(1)(j) of the Mechanics' Lien Act. The phrase "whether employed under a contract of service or not" has been removed from the definition as it appears to be redundant.	Discussion Draft Provision: 24. "worker" means a person employed for wages in any kind of labour, whether employed under a contract of service or not; Mechanics' Lien Act Provision: (j) "workman" means a person employed for wages in any kind of labour, whether employed under a contract of service or not.
27. "workers' trust fund" means any trust fund maintained in whole or in part on behalf of any worker on an improvement and into which any monetary supplementary benefit is payable as wages for work done by the worker in respect of the improvement;	Paragraph 27 This definition is substantially the same as the definition found in paragraph 25 of the Discussion Draft. The Committee Draft provides for the partial subrogation of a workers' trust fund to the lien rights of the workers interested in the fund.	Discussion Draft Provision: 25. "workers trust fund" means any fund maintained in whole or in part on behalf of any worker on an improvement and into which any monetary supplementary benefit is payable as wages for work done by the worker in respect of the improvement.

Subsection 1(1).....

Significant portions of workers' wages are often paid into such trust funds, which are then administered jointly by unions and employers' organizations. See notes under sections 35 and 83 in respect to the assertion of lien claims by these funds.

28. "written notice of a lien" includes a lien claim and any written notice given by a lien claimant that,
   i. identifies his payer and identifies the premises, and
   ii. states that he has not been paid an amount that he is owed by his payer in respect of services and materials supplied by him to the improvement.

Paragraph 28

This is a new definition. In many provisions of the proposed Act the rights and obligations of the parties turn upon whether a person has been given "written notice of a lien". The concept of such notice is a hold-over from the Mechanics' Lien Act.

(2) For the purposes of this Act, materials are supplied to an improvement when they are,
   (a) placed on the land on which the improvement is being made;
   (b) placed upon land designated by the owner or his agent that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or
   (c) in any event, incorporated into or used in making or facilitating directly the making of the improvement.

Subsection 2 and 3

These two subsections are similar to subsections 1(2) and (3) of the Discussion Draft They consolidate several concepts which are contained in subsections 6(1),(3) and (4) of the Mechanics' Lien Act. The purpose of these two provisions is to enable all parties to determine when materials have been supplied to an improvement. The lien of a materialman does not arise until his materials have been supplied within the meaning of the Act. If materials are delivered to land on which the improvement is to be made, they are deemed to be supplied for the purposes of the Act. The lien arises from the time of the delivery. By the same token, if they are delivered to land in the immediate vicinity of the improvement

Discussion Draft Provision:

(2) For the purpose of this Act, materials are supplied when they are,
   (a) placed on the land on which the improvement is done or made;
   (b) placed upon land in the immediate vicinity, designated by the owner or his agent but placing materials on land so designated does not, of itself make that land subject to a lien; or
   (c) in any event, incorporated into or used in making or

Subsection 1(3).....

(3) A contractor or subcontractor to whom materials are supplied and who designates land under clause (2)(b) is deemed to be the owner's agent for that purpose, unless the person supplying the materials has actual notice to the contrary.

which is designated by the owner, then they are deemed to be supplied at the time of delivery and the lien will also arise at that time. In either case, it does not matter whether the materials are ever actually used in the making of the improvement they are provided to be so used. Where, however, the materials are delivered to a place which is not in the immediate vicinity of the improvement, such as a central warehouse, they are deemed not to be supplied until they are actually incorporated in the improvement, and no lien will arise until they are so incorporated.

facilitating the making of the improvement.

(3) A contractor or subcontractor to whom materials are supplied and who designates land under clause b of subsection 2 is deemed to be the owner's agent for that purpose unless the person supplying the materials has actual notice to the contrary.

Mechanics' Lien Act Provision:

6.- (1) Unless an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this act, but delivery on the designated land does not make such land subject to a lien.

Subsection 1(3).....

(3) The lien given by subsection (1) attaches as therein set out where the materials delivered to be used are incorporated into the land, building structure or works, notwithstanding that the materials may not have been delivered in strict accordance with subsection (1).

(4) In subsection (1), "agent" includes the contractor or subcontractor for whom the materials are placed or furnished, unless the person placing or furnishing the materials has had actual notice from the owner to the contrary.

2.- (1) For the purposes of this Act, a contract is substantially performed when the improvement to be made under that contract is,

(a) ready for use or is being used for the purposes intended; and

(b) capable of completion or, where there is a patent defect, correction, at a cost of not more than,

(i) 3 per cent of the first $500,000 of the contract price,

(ii) 2 per cent of the next $500,000 of the contract price, and

(iii) 1 per cent of the balance of the contract price.

Section 2

Subsection 1 replaces section 1(3) of the Mechanics' Lien Act. There have been many problems with the doctrine of substantial performance since it was incorporated into the Mechanics' Lien Act. Because of the definition of the term "contract" in the Committee Draft, it is now clear that the doctrine of substantial performance applies only to contracts between the owner and the contractor. In other words, it does not apply to subcontracts. To apply the doctrine to subcontracts would not appreciably expedite the release of holdback funds. However, it can jeopardize legitimate lien claims of suppliers and workmen, since they often have no way of determining whether a subcontract has been substantially performed.

Discussion Draft Provision:

2.-(1) For the purposes of this Act, a contract is substantially performed,

(a) when the improvement is ready for use or is being used for the purposes intended; and

(b) when the improvement is capable of completion, or, where there is a patent defect, correction, at a cost of not more than,

(i) 3 per cent of the first $500,000 of the contract price,

(ii) 2 per cent of the next $500,000 of the contract price, and

Subsection 2(1).....

For this reason, the doctrine of substantial performance has been confined to the main contract only.

The words "shall be deemed" have been removed from the definition of substantial performance. The Committee Draft sets out a procedure for fixing the date of substantial performance, and the use of a deeming clause in the definition might have resulted to confusion.

The third major change is the increase of the $250,000 figures described in subclauses (i) and (ii) to $500,000. This change has been made to account for the depreciation in the value of the dollar, since the doctrine of substantial performance was first incorporated into the Act.

Subsection 1 has been modified slightly from the form in which it appeared in the Discussion Draft in order to make clearer its application to some forms of project organization, such as construction management.

Under the new definition, it is now clear that only "patent defects" are to be taken into consideration in determining whether or not there has been substantial performance of the contract. A patent defect is one which is self-evident.

(iii) 1 per cent of the balance of the contract price.

Mechanics' Lien Act Provision:

(3) For the purposes of this Act, a contract shall be deemed to be substantially performed,

(a) when the work or a substantial part thereof is ready for use or is being used for the purpose intended; and

(b) when the work to be done under the contract is capable of completion or correction at a cost of not more than

(i) 3 per cent of the first $250,000 of the contract price,

(ii) 2 per cent of the next $250,000 of the contract price, and

(iii) 1 per cent of the balance of the contract price.

Subsection 2(1).....

Under the existing definition, many owners have refused to release the holdback for many months after the apparent substantial performance of the contract, for fear that there may be latent, or hidden, defects in the work which has been done. It is clear that it was never intended for the holdback provisions of the Act to be used for this purpose.

(2) For the purpose of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Subsection 2(2)

Subsection 2 is identical to subsection 2(2) of the Discussion Draft, and is derived from and is similar to, section 1(4) of the Mechanics' Lien Act. The purpose of this provision is to provide for the possibility of severing a completed part of an improvement from the improvement as a whole where the completed part is of use to the owner and the remainder of the improvement cannot be completed expeditiously. This may be advantageous to all parties involved in the project, since it will prevent a prolonged and unexpected delay in the release of the holdback.

Discussion Draft Provision:

(2) For the purpose of this Act, where the improvement of a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the service or materials remaining supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Mechanics' Lien Act Provision:

(4) For the purpose of this Act, where the work or a substantial part thereof is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
PART I General 3.- (1) Subject to section 16 (where lien does not attach to the premises), this Act binds the Crown but does not apply in respect of a contract as defined in the Ministry of Transportation and Communications Creditors Payment Act, and to which that Act applies. (2) Section 7 of the Proceedings Against the Crown Act does not apply in respect of an action against the Crown under this Act.	Section 3 This section is virtually identical to section 3 of the Discussion Draft and to section 2 of the Mechanics' Lien Act. The law of mechanics' liens has applied to the Crown in right of the Province of Ontario since 1975. For constitutional reasons, it does not and cannot extend to the Federal Crown. Section 3 permits claims against the Crown to be dealt with in a manner similar to claims against private owners. However, provincial road construction continues to be governed by the Ministry of Transportation and Communications Creditors Payment Act, which establishes a different scheme of rights. That Act has been found to be satisfactory to both the Ministry and those who are engaged in road construction. Section 7 of the Proceedings Against the Crown Act does not apply to an action against the Crown under this Act. That section requires the giving of notice to the Crown of any pending action - a procedural provision which is incompatible with those under this Act. However, the Proceedings Against the Crown Act continues to apply to the bringing of trust claims against the Crown, since they may not be brought in an action under Part VIII.	Discussion Draft Provision: 3.-(1) Subject to section 17 (where lien does not attach to premises) this Act binds the Crown but does not apply in respect of work under a contract as defined in The Ministry of Transportation and Communications Creditors Payment Act, 1975 and to which that Act applies. (2) Section 7 (notice of claim to Crown) of The Proceedings Against the Crown Act does not apply in respect of proceedings against the Crown under this Act. Mechanics Lien Act Provision: 2.-(1) Subject to subsection 6(1), this Act binds the Crown but does not apply in respect of work under a contract as defined in the Ministry of Transportation and Communications Creditors Payment Act and to which that Act applies. (2) Section 7 of the Proceedings Against the Crown Act does not apply in respect of proceedings against the Crown under this Act.

Section 4.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
4. An agreement by any person who supplies services or materials to an improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.	Section 4 Section 4 is the same as section 4 of the Discussion Draft and replaces section 5 of the Mechanics' Lien Act. In effect, the Mechanics' Lien Act permits anyone other than a workman earning less than $50 a day to waive by contract the rights and remedies provided to him under the Act. Given the rate of pay in the modern construction industry, in theory almost anyone is entitled to contract out of their rights. But such contractual waiver is rare. Usually it is only those who are in the weakest bargaining position or who are unaware of the realities of the industry and the law who will agree to waive their rights. Unfortunately, these are the very people the Act was intended to protect. There seems to be little benefit to be derived from agreeing to waive one's rights under the Act. Since a contractual waiver by one supplier cannot affect the rights of any other potential claimant, the holdbacks required by the Act must usually be retained even where a supplier has agreed to waive his rights. If other forms of protection, such as labour and material payment bonds were available to protect the suppliers to an improvement, then it might be advisable to provide for the waiver of lien rights. Unfortunately, no such schemes are available. Given the	Discussion Draft Provision: 4. An agreement by any person who supplies services or materials to any improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void. Mechanics' Lien Act Provision: 5.-(1) Every agreement, oral or written, express or implied, on the part of any workman that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void. (2) Subsection (1) does not apply, (a) to a manager, officer or foreman; or (b) to any person whose wages are more than $50 a day. (3) No agreement deprives any person otherwise entitled to a lien under this Act, who is not a party to the agreement, of the benefit of the lien, but it attaches, notwithstanding such agreement.

Section 4.....

existing state of the industry, and the fact that the waiver provision has been abused in the past, there appears to be little justification in continuing to permit the contractural waiver of the rights and remedies unde the Act. Therefore, the Committee recommends the prohibition of the contractual waiver of the rights and remedies provided by the Act.

5. Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.

Section 5

This section replaces section 5 of the Discussion Draft and also section 12(9) of the Mechanics' Lien Act. It is a corollary of section 4 of the Committee Draft. Section 5 is inserted for the purpose of clarification. Since the Act renders any contractual waiver of the Act void, the question might arise as to whether any contract which contained such a provision would be enforceable on grounds of illegality. Section 5 makes it clear that any contract or such subcontract inconsistent with this Act will continue to be enforceable. However, the inconsistent portion of the contract or subcontract will be deemed to be amended to bring it into conformity with the Act.

Discussion Draft Provision;

5. Every contract or subcontract related to an improvement is deemed to be amended in so far as necessary to be in conformity with this Act.

Mechanics' Lien Act Provision:

12.-(9) Every contract shall be deemed to be amended in so far as is necessary to be in conformity with this section.

Section 6.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
6. No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32(2) or (5), subsection 33(1) or subsection 34(5), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered.	Section 6 Section 6 of the Discussion Draft purported to relieve against any failure by anyone to comply strictly with a requirement under the Act, unless a person was prejudiced as a result of the deviation from proper procedure. It was thus far wider in scope than section 19 of the Mechanics' Lien Act, which merely protects lien claimants from a failure to comply strictly with some of the procedural requirements of the Act. The Committee appreciates the concerns that form should not be allowed to triumph over substance, and that a party should not be unduly penalized because of some trifling error in procedure. However, after giving careful consideration to the question of whether substantial compliance with the Act should be sufficient, the Committee has decided that such compliance should not, in general, be sufficient. Acts such as the Mechanics' Lien Act and the Construction Lien Act create complicated systems of substantive rights which are inextricably intertwined with adherence to proper procedure and form. The owner's right to deal with his property, and the contractor's and subcontractors' rights to receive payment of the monies that are owed to them are, to a large extent, subject to the procedural provisions of the Act. Lien claimants have a right to expect	Discussion Draft Provision 6.-(1) Nothing under this Act and no claim for lien or trust claim is invalidated by reason only of a failure to comply strictly with any of the requirements of this Act unless in the opinion of the court a person has been prejudiced thereby and then only to the extent of the prejudice suffered. (2) Nothing in subsection 1, (a) dispenses with a requirement for registration; or (b) extends, or permits the extension of, the time limits for preserving or perfecting a lien. Mechanics' Lien Act Provision: 19.-(1) Substantial compliance with sections 17, 18, 23 and 33 is sufficient and no claim for lien is invalidated by reason of failure to comply with any of the requirements of such sections unless, in the opinion of the judge or officer trying the action, the owner, contractor or subcontractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is thereby prejudiced. (2) Nothing in this section dispenses with the requirement of registration of the claim for lien.

Section 6.....

the owner and other payers to comply with the payment procedures laid down by the Act, just as the owner and payers have a right to expect that all claims will be made on time and in accordance with the procedure set down in the Act. It is not unduly onerous to insist upon adherence to the procedures set down in the Act. Indeed, if it is not necessary to comply with a prescribed procedure, one questions the need for prescribing that procedure in the first place.

We believe that section 6 of the Discussion Draft imperiled the smooth operation of the Act. Indeed, we believe that section 19 of the existing Act, as it has been interpreted by the courts has too wide an application. In our view, the concept of substantial compliance jeopardizes the operational success of a statute such as the Construction Lien Act. We see it as opening the door to endless litigation. Over and above this concern, it is possible that many payers may feel insecure in making payments, if the curative provisions of the Act are given too extensive an application.

In the opinion of the Committee, the general curative provision of the Act should relieve only against minor errors or omissions in the preparation of the documents and forms under the Act. The Committee Draft version of section 6 reflects this position. In addition, we have added special curative provisions into some of the sections of the Act, where it would not be contrary to the smooth operation of the Act to empower a court to relieve against a particular procedural requirement of the Act.

PART II

Trust Provisions

7.- (1) All amounts received by an owner, other than the Crown, or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor, subcontractors and other persons who supply services or materials to the improvement.

Section 7

Subsection 7(1) is substantially similar to subsection 3(4) of the Mechanics' Lien Act. It provides that all money received by an owner, for the purpose of financing an improvement, constitutes a trust fund for the benefit of all persons who supply services or materials to the improvement, subject to the payment of the purchase price and prior claims on the land. In other words, the trust arises as soon as the owner receives the money, but he may use it to purchase and clear the title of the land on which the improvement is to be made. Once he has done that, he may only use the trust money for a purpose authorized by the Act.

The proposed subsection is basically the same as in the Discussion Draft. On the recommendation of the Committee, however, the term "land" has now been defined to include land and structures that were on the land prior to the commencement of the new improvement. See paragraph 1(1)10. Following consultation with The Workmen's Compensation Board, the Board's status as a trust beneficiary has been eliminated as it appears to be unnecessary. A similar change has been made to all other trust provisions in this Act.

Discussion Draft Provision:

7.-(1) All sums received by an owner, other than the Crown, a municipality as defined in The Municipal Affairs Act or a metropolitan, regional or district municipality or a local board thereof, that are to be used in the financing of an improvement, including the purchase price of the land and prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor, subcontractors and other persons who have supplied services or materials to the improvement, and for the benefit of the Workmen's Compensation Board.

Mechanics' Lien Act Provision:

(4) All sums received by an owner, other than the Crown, a municipality as defined in the Municipal Affairs Act or a metropolitan or regional municipality or a local board thereof, which are to be used in the financing, including the purchase price of the land and the payment of prior encumbrances, of a building, structure or work, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund in the hands of

Subsection 7(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		owner for the benefit of the persons mentioned in subsection (1), and, until the claims of all such persons have been paid, the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.
(2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by him at any time thereafter constitutes a trust fund for the benefit of the contractor, subcontractors and other persons who supply services or materials to the improvement.	Proposed subsection 7(2) imposes a second trust obligation on the owner. It is similar to subsections 3(3) of the Mechanics' Lien Act and 7(2) of the Discussion Draft. Subsection 2 imposes a trust where an amount is certified by a payment certifier to be payable under a contract. The trust attaches to an amount equal to the amount so certified that is in the owner's hands at the time the certificate is issued, or that is received by the owner at any time thereafter. This trust would apply even though the money was not borrowed, or otherwise acquired, for the specific purpose of financing the improvement. The provision is designed to deal with those situations where the owner is financing an improvement out of his own general funds.	Discussion Draft Provision: (2) Where sums become payable under a contract to a contractor by an owner on the certificate of a payment certifier, an amount equal to the sums so certified that is in the owner's hands or received by him at any time thereafter constitutes a trust fund for the benefit of the contractor, subcontractors and other persons who have supplied services or materials, or both, to the improvement, and for the benefit of the Workmen's Compensation Board. Mechanics' Lien Act Provision: (3) Where a sum becomes payable under a contract to a contractor by an owner on the certificate of a person authorized under the contract to make such a certificate, an amount equal to the sum so certified that is in the owner's hands or received by him at any time time thereafter shall, until paid to the contractor,

Subsection 7(3).....

		constitute a trust fund in the owner's hands for the benefit of the contractor, subcontractor, Workmen's Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rented equipment to be used on the contract site, and the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rented equipment to be used on the contract site and all contractors and subcontractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.
(3) Where the substantial performance of a contract has been certified or has been declared by the court, an amount that represents the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by him at any time thereafter constitutes a trust fund for the benefit of the contractor, subcontractors and other persons who supply services or materials to the improvement.	Proposed subsection 7(3) imposes a third trust obligation on an owner. This new provision provides that money in an owner's hands becomes a trust fund after a certificate of substantial performance of the contract has been issued or a declaration of substantial performance has been made by the court. Money received by the owner after the certification or declaration of substantial performance will also be impressed with the trust. Certification or declaration of substantial performance may take place even where there are no progress draws on the certificate of a payment certifier. Therefore, the Committee thought it desirable to impress these funds with a trust.	

Subsection 7(4).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(4) The owner is the trustee of the trust funds created by subsections (1), (2) and (3), and he shall not appropriate or convert any part of a fund to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.	Under the Mechanics' Lien Act, the nature of the trustee's obligations, and the method by which these obligations may be discharged, are unclear. The purpose of proposed subsection 4 is to clarify the nature of the trustee's obligations. It must be read in conjunction with sections 10, 11 and 12. The subsection, as originally set out in subsection 7(3) of the Discussion Paper provided for an additional procedure, other than the lien procedures, whereby a beneficiary could stop the flow of trust money in the hands of a trustee above the person who was obliged to pay him. The Discussion Draft's trust provisions were a codification of the case law that had emerged in respect to the owner's obligations as trustee. See Bre-Aar Excavating Ltd. v. D'Angela Const. (Ont.) Ltd. After extensive discussions, the Committee decided that there should be no such statutory procedure and that the case law should also be reversed. In the opinion of the Committee, any additional procedure that envisaged a stoppage in the flow of payments no matter how carefully designed, would severely inhibit the flow of money down the construction pyramid. Cautious owners would be reluctant to pay the contractor	Discussion Draft Provision: (3) The owner is the trustee of the trust funds created by subsections 1 and 2 and he shall not appropriate or convert any part of the funds to his own or to any use not authorized by the trust until, (a) the contractor is paid any amount justly owed to him; and (b) provision for the payment of other affected beneficiaries of the trust funds is made under section 10, where, prior to the payment of the contractor, the owner receives notice that payment to the contractor will, or is likely to, result in a breach of a trust by the contractor to those beneficiaries.

Subsection 8(1).....

8.- (1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement.

for fear of further liability to other trust beneficiaries. In the opinion of the Committee, the harm resulting from such a remedy would far exceed any possible benefit that a provision of this nature could provide.

Section 8

Subsection 8(1) replaces 3(1) of the Mechanics' Lien Act. It is designed primarily to protect those working on an improvement from the insolvency or bankruptcy of a contractor or subcontractor. Where money is paid under a contract or subcontract after the contractor or subcontractor has gone bankrupt, the money received by the trustee administering the bankrupt's estate is impressed with a trust. The trust fund must first be used to satisfy the claims of the beneficiaries. The trustee in bankruptcy becomes entitled to money paid to the bankrupt contractor or subcontractor for the benefit of general creditors of the bankrupt only if there is a surplus.

Clause a clarifies the time at which the trust arises. It adopts the rule laid down by the Supreme Court of Canada in Minneapolis Honewell Regulator Co. v. Empire Brass Co., and rejects the approach taken in some earlier cases.

Discussion Draft Provision:

8.-(1) All sums, including any interest on the holdback received by a contractor or subcontractor on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement and for the benefit of the Workmen's Compensation Board and for the benefit of the owner or any contractor or subcontractor to compensate for any just set-off or counterclaim related to the improvement.

Mechanics' Lien Act Provision:

3.-(1) All sums received by a builder, contractor or subcontractor on account of contract price constitute a trust fund in his hands for the benefit of the owner, builder, contractor, subcontractor, Workmen's Compensation Board, workmen, and persons who have supplied materials on account of the contract, or who have rented equipment to be used on the contract site, and the builder, contractor

Subsection 8(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	The Committee decided that there is no benefit to be derived from making a payer on a contract or subcontract who has paid money down to the construction pyramid a beneficiary of the trust imposed upon the recipient of of that money as a result of the payment. Indeed, we are unable to understand why this was provided for under the Mechanics' Lien Act. Those paying money under the Act have sufficient opportunity to determine what amount to pay out, as well as other remedies in contract law. Therefore, subsections (1) and (2) have been revised to omit payers as beneficiaries of trusts created after money has been paid down. To balance the effect of this change, in part, the right to set-offs and claims against trust fund money has been clarified in section 12.	or subcontractor, as the case may be, is the trustee of all such sums so received by him and he shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rented equipment to be used on the contract site and all subcontractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.
(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by him.	Subsection 8(2) clarifies the nature and extent of the contractors' and subcontractors' obligations as trustees. As in subsection 7(4), the Committee decided to amend subsection 8(2) by removing the procedure to stop the flow of trust funds in the hands a trustee. With respect to the removal of the Workmen's Compensation Board as a beneficiary of the trust, see notes following section 7(2).	Discussion Draft Provision: (2) The contractor or subcontractor receiving sums mentioned in subsection 1 is the trustee of the trust fund and he shall not appropriate or convert any part of the funds to his own use or to any use not authorized by the trust until, (a) subcontractors and other persons who have supplied services or materials to the improvement are paid any amount justly owed by him to them; (b) the Workmen's Compensation Board is paid for any assessment against him related to the improvement;

Subsection 9(1).....

(c) the owner and any contractor or subcontractor to whom he has supplied services or materials related to the improvement have been compensated for any just set-off or counterclaim against him related to the improvement; and

(d) provision for the payment of other affected beneficiaries of the trust is made under section 10, where prior to the payment of a person described in clause a, the contractor or subcontractor receives notice that payment to that person will, or is likely to, result in a breach of a trust by that person to those beneficiaries.

9.-(1) Where the owner's interest in a premises is sold by the owner prior to the time at which liens would have expired under Part V, the consideration received by that former owner as a result of the sale constitutes a trust property, and all liens that would have been enforceable against the premises but for the sale continue as a charge against the trust property, to the same extent as those liens would have been enforceable had the premises not been sold.

Section 9

This is a new provision added by the Committee. It is designed to prevent the circumvention of lien claims through the sale of the property by the original owner prior to expiry of lien rights. Under the current law, persons with unregistered liens usually have no rights against land after it is sold, because only rarely will the purchaser be an "owner" of the premises within the meaning of the Act. As a general rule, it would be unfair to attach liability to an innocent purchaser of a new home.

Subsection 9(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) The former owner is the trustee of the trust created by subsection (1), and he shall not appropriate or convert any part of the trust property to his own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to him related to the improvement.	The section corrects the problem by providing that the consideration received by the vendor from the sale constitutes a trust property. All liens that would have been enforceable against the property, prior to the sale, continue as a charge against this trust property. The obligations of the former owner, as trustee of the trust property, are set out in subsection 2. This provision should be of particular use in the case of residential subdivision construction.	
10. Subject to Part IV (holdbacks), every payment by a trustee to a person he is liable to pay for services or materials supplied in relation to the improvement discharges the trust of the trustee making the payment and his obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by him.	Section 10 In the Discussion Draft, section 10 first appeared as a new provision, section 9. In the absence of fraud a trustee may now fully and conclusively discharge his obligations to all beneficiaries of a trust, by paying the person whom he owes for the services or materials which have been supplied to him. The payment discharges the trust on a dollar-for-dollar basis. The Committee decided that this section is necessary to clarify the obligations of a trustee, which have become confused in the case law: See notes under subsection 7(4). This section illustrates a basic philosophy of the Committee: that every effort should be made to minimize the disruption of the flow of funds through the construction pyramid.	Discussion Draft Provision: 9. Except where a trustee under this Part receives notice that payment of the person whom he is liable to pay will, or is likely to, result in a breach by that person of a trust under this Part, every payment to that person discharges the trust of the trustee making the payment and his obligations and liability as trustee to the extent of the payment made.

Section 10.....

Section 10 of Discussion Draft (deleted)

Section 10 of the Discussion Draft originally dealt with the duties of a trustee upon receiving notice that payment to a person whom he is liable to pay would result in a breach of trust by that person to some other beneficiary of the trust. As a result of the Committee's decision to remove the procedure allowing a beneficiary to stop the flow of trust money in the hands of a trustee, this section was deleted. See notes under subsection 7(4).

The Committee has redrafted the trust provisions of the Act so as to make the obligations of the trustee as clear as possible. His duty is to pay the persons whom he personally owes for the services and materials that each of them have supplied to the improvement. However, the Committee Draft contains a new provision (section 68) which will permit a trustee or other person who believes that he has come into possession of trust funds to apply to the court directions, should he be unclear as to his rights and obligations in respect of those funds

Discussion Draft Provision:

10.-(1) Where a trustee receives notice that payment to the person whom he is liable to pay will, or is likely to, result in a breach of trust by that person to some other beneficiary of the trust he shall retain from the person whom he is liable to pay a sum sufficient to satisfy the claim underlying the notice in order to make provision for the payment of the other beneficiary and the trustee shall,

(a) where all parties are agreed as to the amount that the other beneficiary is justly owed, pay the other beneficiary; or

(b) in all other cases, pay into court the sum retained and apply to the court for relief by way of interpleader,

and upon so doing, the trustee's obligation and liability to the person from whom payment is withheld is thereby discharged to the extent of the payment made under clause a or b, and the trustee's obligation and liability to the other beneficiary is extinguished.

(2) In addition to any other ground on which he may be liable, any person who, without reasonable grounds, gives notice that a breach of trust will, or is likely to, result if a payment is made is liable to any person who suffers damage as a result.

Subsection 11(1).....

11.-(1) Subject to Part IV (holdbacks), a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by him without being in breach of the trust.

(2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to him and that is not subject to a trust under this Part, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust.

Section 11

This section consolidates subections 3(2) (5) and (6) of the Mechanics' Lien Act. The purpose of the provision is to permit a trustee to repay out of trust money any sums he has borrowed or used from funds that are not subject to the trust to discharge his obligations under the trust. Where non-trust money is used to pay a trust beneficiary, the trustee may then retain an equal amount money from of the trust.

Upon the recommendation of the Committee, section 11 of the Discussion Draft has been rewritten as two subsections instead of one. In its new form, section 11 more clearly preserves the substance of the relevant subsections of the Mechanics' Lien Act, while employing the language used throughout the Draft Act.

Discussion Draft Provision:

11. A trustee who pays any claim payable out of a trust fund under this Part by using money not subject to the trust may reimburse the person, including himself, who provided the money, whether as a lender or otherwise without being in breach of the trust.

Mechanics' Lien Act Provision:

(2) Notwithstanding subsection (1), where a builder, contractor or subcontractor has paid in whole or in part for any materials supplied on account of the contract or for any rented equipment or has paid any workman who has performed any work or any subcontractor who has placed or furnished any materials in respect of the contract, the retention by such builder, contractor or subcontractor of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

(5) Notwithstanding subsection (4), where an owner has himself paid in whole or in part for any work done, for any materials placed or furnished or for any rented equipment, the retention by him from any moneys received from the lender under subsection

Section 11.....

(4) of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

(6) Notwithstanding anything in this section, where money is lent to a person upon whom a trust is imposed by this section and is used by him to pay in whole or in part for any work done, for any materials placed or furnished or for any rented equipment, trust money's may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and any sum so applied shall be deemed not to be an appropriation or conversion to the trustee's own use or to any use not authorized by the trust.

Section 12 of the Discussion Draft (deleted)

Section 12 of the Discussion Draft was intended to ensure that the benefits of the trust provisions were not defeated by an assignment of a trustee's interest in trust money to some other person or institution. In the opinion of the Committee, such a declaratory provision is unnecessary, and might lead to confusion. For this reason, section 12 has been deleted.

Discussion Draft Provision:

12. Where a right to any payment which upon receipt by the assignor would be subject to a trust under this Part is assigned, the moneys received by the assignee are subject to the trust.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
12. Subject to Part IV (holdbacks), a trustee may, without being in breach of trust, retain from trust funds an amount that is, as between himself and the person he is liable to pay, the balance in the trustee's favour of outstanding debts, claims or damages, whether or not related to the improvement.	Section 12 The Committee was of the view that it was necessary to define the claims that a trustee could make and set-off against a trust fund. Section 12 is designed to accomplish this purpose. In the opinion of the Committee, a trustee should be able to deduct from trust funds all set-offs and claims against the person whom he is liable to pay under a contract or subcontract. This should not, however, affect his liability in respect of the holdback under section 30. The set-offs and claims which a trustee is entitled to deduct from the trust fund are not limited to those in respect of the improvement. The value of the trust claim would, therefore, be the net amount still owing by the trustee after all the respective claims and debts of the parties against each other have been taken into account.	
13.-(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part, (a) every director or officer of a corporation; (b) every employee or agent of a corporation; and (c) any person having effective control of a corporation, who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.	Section 13 This new section was included in the Discussion Draft to prevent the use of a shell corporation as a device for defrauding creditors. The use of such corporations presents a problem in some segments of the construction industry. Section 13 allows the court to disregard the limited liability of a corporation, and to impose liability upon those who are actually responsible for a breach of trust. The words "assents to or acquiesces in" in subsection 1 are intended to convey that only those who had the power to prevent a breach of trust are to be found liable under this section.	Discussion Draft Provision: 13.-(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part, (a) every director or officer of a corporation; and (b) every other person having effective control of a corporation, who assents to or acquiesces in conduct that amounts to a breach of trust by the corporation is personally liable for the breach of trust. (2) The question of whether a person

Subsection 13(2).....

(2) The question of whether a person has effective control of a corporation is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

(3) Where more than one person is found liable for a particular breach of trust under this Part, those persons are jointly and severally liable.

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances.

The section replaces the penal provision of the Mechanics' Lien Act, contained in subsubsection 3(7). This type of provision is unnecessary in light of section 296 of the Criminal Code which makes it an indictable offence, punishable by up to 14 years imprisonment, to convert trust funds with an intent to defraud. Where there is no intent to defraud, the civil liability for breach of trust should be sufficient to rectify any such breach. It is significant to note that subsection 3(7) of the present Act has rarely been used, even though it has been in force for over 20 years.

Subsection 13(3) of the Discussion Draft adopted by reference the relevant provisions of the Negligence Act for the purposes of determining degrees of fault and apportionment of liability in an action for breach of trust. The Committee decided that section 13 should be expanded to explicitly deal with all aspects of a breach of trust under the Draft Act, without reference to other legislation. In addition, the Committee was of the view that the adopted provisions of the Negligence Act were inappropriate.

has effective control of a corporation is one of fact and in determining this the court may disregard the outward form of transactions and the separate corporate existence of the participants.

(3) The provision of The Negligence Act in respect of the determination of degrees of fault and to apportionment of liability therefore apply to an action for breach of the trust imposed in section 7 or 8.

Mechanics' Lien Act Provision:
(7) Every person upon whom a trust is imposed by this section who knowingly appropriates or converts any part of any trust moneys referred to in subsection (1), (3) or (4) to his own use or to any use not authorized by the trust is guilty of an offence and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both, and every director or officer of a corporation knowingly assents to or acquiesces

Subsection 13(3).....

Therefore, two new proposed subsections have been added to deal with liability for breach of trust and apportionment of compensation payable. Subsection 13(3) now expressly provides for the joint and several liability of persons found liable for a breach of trust. Subsection (4) then imposes an obligation on the parties to the breach to share equally the burden of compensation, unless the court considers some other apportionment more appropriate in the circumstances of the particular case.

in any such offence by the corporation is guilty of such offence, in addition to the corporation, and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both.

Section 14 of Discussion Draft (deleted)

Section 14 of the Discussion Draft was designed to replace section 4 of the Mechanics' Lien Act. The section created a one-year limitation period within which proceedings to assert a claim to any trust had to be brought. It replaced the nine month limitation period contained in section 4 of the Mechanics' Lien Act, which applied only to actions against banks and other lending institutions.

Discussion Draft Provision:

14. No proceeding to assert a claim to any trust fund shall be brought later than one year after the payment upon which the claim is made became due.

In the opinion of the Committee, no claim arising from a breach of trust should be barred by a special limitation period. The ordinary limitation periods, as well as the equitable doctrine of laches, should apply to such claims. In these circumstances, there should be no special exemption for banks and other financial institutions.

Mechanics' Lien Act Provision:

(4) No action to assert any claim to trust moneys referred to in section 3 shall be commenced against a lender of money to a person upon whom a trust is imposed by that section except,

(a) in the case of a claim by a contractor or subcontractor in cases not provided for in clauses (b), (c) and (d), within nine months after the completion or abandonement of the contract or subcontract;

(b) in the case of a claim for materials, within nine months after the placing or furnishing of the last material;

(c) in the case of a claim for services, within nine months after the completion of the service; or

(d) in the case of a claim for wages, within nine months after the last work was done for which the claim is made.

Part III
Section 14.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
PART III		
The Lien		
14.-(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.	Section 14 Subsection 1, originally designated as section 15 in the Discussion Draft, replaces the subsection 6(1) of the Mechanics' Lien Act. The purpose of the section is to create a lien in favour of all those who supply services or materials to an improvement over the premises improved. The lien did not exist at common law, but was created by statute. It gives the supplier of services or materials a legal right against the property improved. The Committee approved of the wording of section 15.	Discussion Draft Provision: 15. A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien, for the price of the services or materials that have been supplied, upon the interest of the owner in the premises improved. Mechanics' Lien Act Provision: 6.-(1) Unless he signs an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the
(2) No person is entitled to a lien for any interest on the amount owed to him in respect of the services or materials that have been supplied by him, but nothing in this subsection affects any right that he may otherwise have to recover that interest.	Under the Mechanics' Lien Act it is uncertain whether a person is entitled to claim a lien for the interest on the amount owed to him in respect of services or materials he has supplied to the improvement. The Committee is of the view that there should be no lien right for interest because interest does not represent an improvement to the value of the premises. Interest is recoverable in a personal judgment against the person who failed to pay his debts on time.	

Section 14.....

		work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.
15. A person's lien arises and takes effect when he first supplies his services or materials to the improvement.	Section 15 Section 15 replaces, in part, subsection 7(4) of the Mechanics' Lien Act. It clarifies the time at which the lien arises.	Discussion Draft Provision: 16. A person's lien arises and takes effect when he first supplies his services to the improvement. Mechanics' Lien Act Provision: (4) The time at which the first lien arose shall be deemed to be the time at which the first work was done or the first materials placed or furnished, irrespective of whether a claim for lien in respect thereof is registered or enforced and whether or not such lien is before the court.

Section 16.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
16.-(1) A lien does not attach to the interest of the Crown in a premises. (2) Where an improvement is made to a premises in which the Crown has an interest, but the Crown is not an owner within the meaning of this Act, the lien may attach to the interest of any other person in that premises. (3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is, (a) a public street or highway owned by a municipality; or (b) a railway right-of-way, the lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.	Section 16 This section replaces subsection 6(2) of the Mechanics' Lien Act and section 17 of the Discussion Draft. The section has been redrafted to eliminate the cumbersome and ambiguous term "public work". The Committee was concerned that the definition of the term "public work" in both the Discussion Draft and the existing Act often resulted in confusion where the Crown had an incidental interest in the premises, but was not involved in the contract. There is no reason for the lien not to attach to the interest of other persons in such a case. However, the Committee is of the view that the lien should not attach to the interest of the Crown in a premises in any event. Nor should it attach to municipal street or to a railway right-of-way. The attachment of the lien to a municipal road or to a railway is impractical. The attachment of a lien to Crown land is theoretically absurd, since the Crown is the source of property rights. Furthermore it is unnecessary. Section 26 of the Proceedings Against the Crown Act requires the Crown to to pay all final judgments against it. The purpose of subsection 3 is to create a system of charges equivalent in value to a lien against land to protect those who supply services of materials to the Crown or to an improvement to a public street or railway right-of-way. Where subsection 3 applies, no claim for lien as certificate of action should be registered against the premises.	Discussion Draft: 17. Where the premises improved is, (a) a public street or highway owned by a municpality; or (b) a public work, the lien does not attach to the premises but instead constitutes a charge on the holdbacks under Part IV and the provisions of this Act shall be construed, with necessary modifications, to have effect without requiring the registration of a claim for lien against the premises. Mechanics' Lien Act Provision: (2) Where the land or premises upon or in respect of which any work is done or materials are placed or furnished is, (a) a public street or highway owned by a municipality; or (b) a public work, the lien given by subsection (1) does not in any event attach to such land or premises but shall instead constitute a charge on amounts directed to be retained by section 12, and the provisions of this Act shall be construed, with necessary modifications, to have effect without requiring the registration or enforcement of a lien or a claim for lien against such land or premises.

Section 17.....

17.-(1) The lien of a person is limited to the amount owing to him in relation to the improvement and, subject to Part IV (holdbacks), it is further limited to the least amount owed in relation to the improvement by a payer to the contractor or any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Section 17

Subsection 17(1) consolidates a number of concepts now found in sections 6(1), 10 and 11 of the Mechanics' Lien Act.

By virtue of section 17, an owner is not liable to pay more than the amount that he owes the contractor for the work done on the property, unless the owner commits a breach of trust or fails to retain the holdback as required in Part IV of the proposed Act. Without this provision, the total value of the liens would often exceed the value of the work done. For example, a contractor would have a lien for $1,000 if the value of his contract was $1,000. However, everyone who had supplied services or materials to the contractor would also be entitled to a lien. If the value of the services and materials supplied to the contractor by his subcontractors was $500, then the total value of the liens against the property would be $1,500. Thus, it is important to limit the owner's liability to the amount that he owes to the contractor.

The section further limits the liens of the persons claiming under the contractor. No person's lien can exceed the amount owing in respect to the improvement to any person above him in the construction pyramid.

Discussion Draft Provision:

18-(1) A lien is limited in amount to the sum due to the person having the lien after the deduction of all just set-offs and counterclaims against him with respect to the improvement and, in addition, except as otherwise provided in this Act, it is further limited in amount,

(a) to the sum owed by the owner to the contractor; and

(b) where the lien is claimed by a person other than the contractor, to the sum owed in respect of the improvement to the payer of the person having the lien.

Mechanics' Lien Act Provisions:

6. (1) Unless he signs an express agreement to the contrary and in that case subject to section 5, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or

Subsection 17(1).....

works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

10. Save as herein otherwise provided, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

11. Save as herein otherwise provided, where the lien is claimed by any person other than the contractor, the amount that may be claimed in respect thereof is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been done or the materials were placed or furnished.

Subsection 17(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) Subject to Part IV, the total value of the liens of all members of a class, as defined in section 81, is limited to the least amount owed in relation to the improvement by a payer to the contractor or any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials made by the members of the class.	Subsection 17(2) is substantially the same as subsection 18(2) of the Discussion Draft, with the exception of several drafting revisions. The subsection makes it clear that the value of all the liens claimed by persons who supply services and materials to the same contractor or subcontractor cannot exceed the amount owed to that contractor or subcontractor.	Discussion Draft Provision: (2) The total value of the liens of all members of a class, as defined in section 85, is limited to the sum owed in respect of the improvement to the payer of the class.
(3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person he is liable to pay, the balance in the payer's favour of all outstanding debts, claims or damages, whether or not related to the improvement.	The Committee is of the opinion that in determining the value of the lien of a claimant, allowance should be made for all set-offs, debts and claims that may exist between all persons in the stream of payment of the claimant. These set-offs and claims do not have to be limited to those in respect of the improvement. The value of the lien claim would, therefore, be the net amount still owing after all the respective claims of the parties against each other had been taken into consideration. The right to set-offs and other claims would not apply to allow a reduction of the holdback required by Part IV. Subsection 3, as proposed, reflects this decision.	

Subsection 17(4).....

(4) Despite subsection (1), where land is dedicated to a municipality as a public street or highway and an improvement is made to the land at the written request of, or under an agreement with, the municipality, but not at its expense, the municipality shall nevertheless, on default of payment by the proper payer, be liable to the value of the holdbacks under Part IV that would have been required were the improvement made at the expense of the municipality, and the procedure for making a claim under this subsection shall be the same as for enforcing a claim for lien against a municipality in respect of a public street or highway.

Subsection 17(4) is designed to rectify a problem that currently exists in the case of the supply of services and materials for the construction of roads, sewers, and watermains in a new subdivision. The nature of the problem faced by construction suppliers is well illustrated in the recent discussion of the Court of Appeal in Geo. Winnipeg Canada Ltd. v. Peelton Hills Ltd. et al. When a plan of subdivision in a municipality is registered, the land for public streets is dedicated to the municipality. However, subdivision agreements often provide for the developer to build the roads to the the municipality's specifications, but at the developer's own expense. If these improvements were made by the municipality itself, it would be liable as an owner to the builder's suppliers for the amounts justly owed to them for the services and materials supplied by them. Due to the subdivision agreement however, no claim can be made against the municipality, since it does not pay for the improvement and is therefore not an "owner" within the meaning of the Draft Act.

Subsection 4 alters the existing law and makes the municipality, on default of payment by the developer, financially liable to the extent of any deficiency in the amount of holdbacks that are available to satisfy any lien claims made by the developer's suppliers holdbacks. The municipality can protect itself from liability by taking security, such as bonds, from the developer. The proposed subsection has been redrafted to reflect several suggestions made in public responses to the

Discussion Draft Provision:

(3) Despite clause (a) of subsection 1, where land is dedicated to a municipality as a public street or highway, and improvement is made to the street or highway at the request of, or under an agreement with, the municipality, and,

(a) to its specifications; or
(b) under its supervision,

but not at its expense, the municipality shall nevertheless, on default of payment by the proper payer, be liable to the value of the holdbacks under Part IV that would have been required, if the improvement was made at the expense of the municipality.

Subsection 17(4).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	Discussion Paper. For example, the procedure for making a claim under this section has now been clarified.	
18. Where the interest of the owner in the premises is held jointly or in common with another person who knew or ought reasonably to have known of the making of the improvement, the joint or common interest in the premises of that person is also subject to the lien unless the contractor receives actual notice, before the supply of services or materials to the improvement is commenced, that the person having the joint or common interest assumes no responsibility for the improvement being made.	Section 18 This proposed section replaces section 7 of the Mechanics' Lien Act. Section 7 provides that the husband is conclusively presumed to have been acting for his wife, as well as for himself, in contracting for improvements. Section 18 has been expanded to deal with any interest held jointly or in common with other persons. Under this section, the lien will also attach to the interest of those other owners, so long as the other owners know, or ought to know, that the improvement is being made. Since the improvement will be mutually beneficial to both owners, they should both be responsible for the costs of the improvement if the one who arranged to have the work done defaults in payment. The Committee has revised the legal device for arriving at liability. An owner will not, as under the Discussion Draft, be deemed to have been acting as an agent for those who hold a joint or common interest with him in the property. The Committee sees no reason to rely upon a fiction of agency. Instead, unless notice denying responsibility is given to the contractor before the first work is done, each interest will be subject to a lien.	Discussion Draft Provision: 19. Where the interest of the owner in the premises is held jointly or in common with other persons who knew or ought reasonably to have known of the making of the improvement, for the purposes of this Act the owner is deemed to have been acting not only for himself but also as agent for those other persons and their joint or common interest in the premises is also subject to the lien unless the contractor has had actual notice, before the improvement is made, that the owner is not acting as their agent. Mechanics' Lien Act Provision: 7. Where work is done or materials are placed or furnished to be used upon or in respect of the land of a married woman, or in which she has an interest, with the privity or consent of her husband, he shall be presumed conclusively to be acting as her agent as well as for himself for the purposes of this Act unless before doing the work or placing or furnishing the materials the person doing the work or placing or furnishing the materials has had actual notice to the contrary.

Section 19.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
19.-(1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor serves the landlord with written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, serves the contractor with written notice that the landlord assumes no responsibility for the improvement to be made.	Section 19 Subsection 1 replaces subsection 20(1) of the Discussion Draft and subsection 8(1) of the Mechanics' Lien Act. It has been redrafted by the Committee for the purposes of both clarification and in an effort to bring the terminology in this section in line with that used elsewhere in the Committee Draft.	Discussion Draft Provision: 20.-(1) Subject to subsection 2, where the interest to which the lien attaches is leasehold, the interest of the landlord is also subject to the lien to the same extent as the interest of the owner if the contractor gives notice in writing, by personal service, to the landlord of the improvement to be made, unless the landlord within fifteen days thereafter gives notice in writing by personal service to the contractor that he assumes no responsibility for the improvement being made.
(2) No forfeiture of a lease to, or termination of a lease by, a landlord, except for non-payment of rent, deprives any person having a lien against the leasehold of the benefit of his lien.	Subsection 2 replaces section (1) of the Mechanics' Lien Act.	(2) No forfeiture or attempted forfeiture of the lease on the part of the landlord or cancellation or attempted cancellation of the lease, except for non-payment of rent, deprives any person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after the time when his lien arises, and the amount so paid may be added to his claim.
(3) Where a landlord intends to enforce forfeiture or terminate a lease of the premises because of non-payment of rent, and there is a claim for lien registered against the premises in the proper land registry	A procedure is set out in subsection 3 whereby a landlord intending to cancel a lease for non-payment of rent can give notice to lien claimants.	

Subsection 19(3).....

office, the landlord shall give notice in writing of his intention to enforce forfeiture or terminate the lease and of the amount of the unpaid rent to each person who has registered a claim for lien against the premises.

(4) A person receiving notice under subsection (3) may, within ten days thereafter, pay to the landlord the amount of the unpaid rent, and the amount so paid may be added by that person to his claim for lien.

In subsection 4, a procedure is set out whereby a lien claimant may prevent cancellation of a lease for non-payment of rent. This is a new provision, although it is derived from subsection 8(2) of the Mechanics' Lien Act.

Mechanics' Lien Act Provisions:

8.-(1) Where the estate or interest upon which the lien attaches is leasehold, the fee simple is also subject to the lien if the person doing the work or placing or furnishing the materials gives notice in writing, by personal service, to the owner in fee simple or his agent of the work to be done or materials to be placed or furnished unless the owner in fee simple or his agent within fifteen days thereafter gives notice in writing, by personal service, to such person that he will not be responsible therefor.

(2) No forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, deprives any person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after he becomes so entitled, and the amount so paid may be added to his claim.

Subsection 20.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
20. Where an owner enters into a single contract for improvements on more than one premises owned by him, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials he supplied to all the premises.	Section 20 This section is derived from section 37 of the Mechanics' Lien Act and section 21 of the Discussion Draft. The new provision allows a general lien to be claimed for both the supply of materials and services. Under the Mechanics' Lien Act, a general lien could be claimed only by a contractor, and only in respect of the supply of materials. The purpose of a general lien is to assist all suppliers of services or materials to subdivisions. It avoids the problem of allocating the total supply of services or materials generally to each of the individual buildings in a subdivision. The proposed section 20 is redrafted so that it would only apply where the work on several premises is done under a single contract. However, a general lien may be claimed by either a contractor or a subcontractor, provided that the contract or subcontract of the person claiming the lien provided for the general supply of services or materials to more than one premises.	Discussion Draft Provision: 21. Where a single contract or subcontract is for the supplying of services or materials to improvements on more than one premises that are owned by the same person, the person supplying the services or materials may choose to have his lien follow the form of the contract or subcontract and be a general lien that is for the entire price of all services and materials that are supplied to all the premises, but if he does so choose, the lien is subject to subsection 2 of section 41 (apportionment of general lien). Mechanics' Lien Act Provision: 37. Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying the materials may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, in case the owner has sold one or more of the buildings, the judge or officer trying the action has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

Section 21.....

21. The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17(3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Section 21

This section is derived from section 22 of the Discussion Draft, which, in turn, was derived from subsection 12(5) of the Mechanics' Lien Act. The major effect of this provision is that where an owner complies with the Act, the holdback fund and subject to subsection 17(2), any additional amount owed to the contractor related to the improvement, will take the place of the premises, and the lien then becomes converted to a charge against those amounts. In other words, an owner may protect his interest in the premises from seizure and sale merely by complying with the payment and holdback provisions of the Act. Section 21 has been removed from Part IV and inserted in Part III of the Act, since that is where it more properly belongs.

Discussion Draft Provision:

22. The lien created by Part III is a charge upon the holdbacks required to be retained by this Part in favour of all persons who supply services or materials to the persons to whom those holdbacks are respectively payable.

Mechanics' Lien Act Provision:

(5) The lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the moneys so required to be retained are respectively payable.

PART IV

Holdbacks

22.-(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired as provided in Part V or have been satisfied, discharged or provided for under section 44 (payment into court).

Section 22

This section appeared as section 23 of the Discussion Draft. The provision is a major departure from section 12(1), the holdback section, of the existing Mechanics' Lien Act.

The percentage required to be retained by a person paying on a contract or subcontract has been reduced from 15 per cent to 10 per cent. This reduction of the holdback, proposed in the Discussion Draft, was adopted by the Committee. In the opinion of the majority of the Committee, this change is justified since the rate of 10 per cent more realistically reflects the current margin of profit within the construction industry. A reduced holdback will increase the cash flow within the construction pyramid. While the security available for lien claimants is reduced, the majority of the Committee decided that, on balance, the adverse effects are more than offset by the benefits. The Committee also proposes a number of provisions to minimize the adverse effects of the reduction of holdback, for example, increased priority for liens over mortgages and greater priority for workers' benefits.

Discussion Draft Provision:

23.-(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until the expiration of the period, as set out in Part V, for the preservation of all liens which may be claimed against that holdback.

Mechanics' Lien Act Provision:

12.-(1) In all cases, the person primarily liable upon a contract under or by virtue of which a lien may arise shall as the work is done or the materials are furnished under the contract, retain for a period of thirty-seven days after the completion or abandonment of the work done or to be done under the contract 15 per cent of the value of the work and materials actually done, placed or furnished as mentioned in section 6, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value

Subsection 22(1).....

Section 22, like section 23 of the Discussion Draft, provides for two holdbacks, instead of the single holdback provided for under the Mechanics' Lien Act. The first, created by subsection 1, requires the retention of 10 per cent of the price of the services or materials actually supplied from the commencement of the making of the improvement to the date certified as the date of substantial performance of the contract (where there is no certification, it requires retention of 10 per cent of the price of all services and materials supplied). Section 26 will permit the release of this holdback after 45 days from the publication of a notice of substantial performance under section 32.

shall be calculated upon evidence given in that regard on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work materials.

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

Because the early release of holdback would jeopardize the finishing trades, subsection 2 creates a second holdback, requiring the retention of 10 per cent of the price of all services and materials supplied from the day certified as the day the contract was substantially performed to the day it was completed.

Discussion Draft Provision:

(2) Where the contract has been certified as substantially performed but services or materials remain to be supplied in order to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain from the date certified as the date of substantial performance of the contract, a separate holdback equal to 10 percent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until the expiration of the period, as set out in Part V, for the preservation of all liens which may be claimed against that holdback.

Subsection 22(3).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.	Subsection 3 is identical to subsection 22(3) of the Discussion Draft and is similar to part of section 12(1) of the existing Act. It requires the retaining of a holdback whether the contract or subcontract is paid for in partial payments, or only on completion. The money that constitutes the holdback must be set aside as the work is done irrespective of how the work is paid for. This subsection modifies the rule set out in section 17 that the owner is not liable for more than he owes to the contractor. Where there is a default by the contractor on a contract which calls for payment on completion, the owner is still liable for the holdback to the other suppliers to the improvement, even though he may not be liable for payment on the contract to the contractor.	Discussion Draft Provision: (3) The obligation to retain the holdbacks under subsections 1 and 2 applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.
23.-(1) An owner is personally liable to those lien claimants who have valid liens against his interest in the premises to the extent of the holdbacks that he is required to retain under this Part.	Section 23 Section 23, as proposed, is new and based upon a recommendation made by the Committee. Traditionally, the only liability of an owner in a lien action to persons other than the contractor was in respect of his interest in the premises. In the opinion of the Committee, a major cause of the insecurity of holdbacks in the industry today is the failure of owners who are self-financing to maintain an actual holdback. In an attempt to alleviate this problem, the Committee decided that an owner should be held personally liable to the extent of the holdbacks that he is required to retain. Therefore, lien claimants would be entitled to obtain judgment against an owner in his personal capacity upon his failure to retain a holdback.	

Subsection 23(2).....

(2) The personal liability of an owner under subsection (1) may only be determined in an action under this Act.

Subsection 2 is required to prevent the bringing of a claim against the owner in respect of the holdback in a civil proceeding other than an action under the Act. The Committee felt that a provision of this nature was required to prevent a multiplicity of proceedings.

Section 24 of Discussion Draft (Deleted)

Section 24 of the Discussion Draft established a joint trust account system as a method of securing the holdback. Under subsection 1, the owner was required to deposit the basic holdback into an interest-bearing joint trust account on any contract where the value of the services or materials to be supplied amounted to $150,000 or more.

The Committee decided that the system set out in section 24 was too rigid to serve as the method of providing security. This decision was reached after considering the many briefs received from the public in response to the Discussion Paper. These briefs raised many possible problems with respect to the administration of a joint trust account, the calculation of interest, and the equitable distribution of the proceeds. Therefore,

Discussion Draft Provision:

24.-(1) Where the contract price or estimated price of services or materials to be supplied under a contract is $150,000 or more, the owner shall pay the holdback required to be retained by subsection 1 of section 23 into a joint trust account.

(2) Where the owner is not required by subsection 1 to pay the holdback into a joint trust account but the owner agrees in writing to do so, the holdback shall be dealt with in the same manner as if subsection 1 applied.

(3) The joint trust account required by subsection 1,

(a) shall be opened and held in the joint names of the owner and the contractor as trustees;

Section 24 of the Discussion Draft.....

the Committee recommends that section 24, as proposed in the Discussion Draft, be deleted.

Various types of holdback security schemes, such as joint trust accounts, bonding, letters of credit, and an industry-financed insurance fund were evaluated by the Committee and found to be inadequate. Each of these systems would add significant costs to construction which would not be proportionate to the risks of default in retaining the holdback.

However, the Committee was of the the opinion that there was a definite need for securing the holdback. Due to the current rates of interest on mortgages, an owner's equity in property can quickly disappear when a mortgage falls into arrears, leaving little to satisfy lien claims. It was agreed that a system providing for the priority of lien claims over building mortgages to the extent of the holdback would be the most effective, efficient and fair method of securing a holdback. Thus, the Committee recommends

(b) may be maintained at any chartered bank, trust company or other financial institution;
(c) shall be an interest bearing account;
(d) shall be held in trust for those who have a charge upon the holdback;
(e) shall require the signatures of both trustees for payment out of the account unless otherwise ordered by the court.

(4) When an owner fails to pay the holdback into a joint trust account as required by subsection 1 or 2, or in any case where an owner is required to retain a holdback, the court,

(a) upon the application of any person having a lien; and
(b) where it is satisfied that the owner is required by subsection 1 or 2 to pay the holdback into a joint trust account or that it is necessary or desirable to secure the holdback,

shall order the owner to pay the holdback into a joint trust account.

Section 24 of the Discussion Draft.....

the establishment of such a lien/mortgage priorities system the details of which may be found in Part XI of the Draft Act (Priorities). This recommendation has been embodied in proposed section 80. The details of this proposal may be found in the notes under that section.

(5) Where, on the application of any person having a lien, the court is satisfied that there is a risk that the joint trust account or the holdback may not be properly administered by reason of the relationship between the owner and the contractor, it may appoint any other person to act as the contractor for the purpose of administering the joint trust account and the holdback.

(6) In determining the relationship between the owner and the contractor under subsection 5, the question of the relationship is one of fact, and the court may disregard the outward form of transactions and the separate corporate existence of the participants.

(7) Notice of an application under subsection 5 shall be given to every person who supplies services or materials directly to the contractor.

(8) Where two-thirds of the number of persons entitled to notice under subsection 7 agree with the owner that the contractor or any other person shall be the contractor for the purpose of administering the joint trust account and the holdback, that agreement is binding on all other persons.

Section 24.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		(9) This section does not apply where the owner is the Crown or a municipality.
24.-(1) A payer acting in good faith may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price of the services and materials that have been supplied under that contract or subcontract unless, prior to making payment, the payer has received written notice of a lien. (2) Where a payer has received a written notice of lien and has retained, in addition to the holdbacks required by this Part, an amount sufficient to satisfy the lien, the payer acting in good faith may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price of the services and materials that have been supplied under that contract or subcontract, less the amount retained.	Section 24 This proposed section is substantially similar to section 25 of the Discussion Draft which was, in turn, derived from subsection 12(7) of the Mechanics'Lien Act. The purpose of the provision is to permit the flow of funds, other than the holdback, down the construction pyramid during the course of the project. It establishes that the payer on a contract or a subcontract, may pay out money that is owing if no written notice of a lien has been received. Where written notice of a lien is received, the payer merely retains an amount sufficient to satisfy that lien, and pays the balance of any money then payable. Since the Committee has recommended the removal of the provisions in Part II of the Draft dealing with the notice of breach of trust, section 24 has been redrafted to reflect this change.	Discussion Draft Provision: 25.-(1) A payer acting in good faith may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price unless prior to making payment, the payer has received, (a) written notice of a lien; or (b) notice that such payment will or is likely to result in a breach of trust under Part II by the person whom he is liable to pay. (2) Where a payer has received a notice as described in subsection 1, and has retained, in addition to the holdback required by this Part, a sum sufficient to satisfy the claim underlying the notice, the payer acting in good faith may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price less the sum retained.

Section 25.....

Mechanics' Lien Act Provision:

(7) All payments up to 85 per cent as fixed by subsection (1) and payments permitted as a result of the operation of subsection (2) and (3) made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by one subcontractor to another cubcontractor, before notice in writing of the lien given by the person claiming the lien to the owner, contractor or subcontractor, as the case may be, operate as a discharge pro tanto of the lien.

25. Where a subcontract has been certified complete under section 33, each payer upon the contract and any subcontract may, without jeopardy, make payment reducing the holdbacks required by this Part to the extent of the amount of holdback he has retained in respect of the completed subcontract, where all liens in respect of the completed subcontract have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court).

Section 25

This section replaces section 12(3) of the Mechanics' Lien Act. It must be read in conjunction with Part V of the Committee Draft, and in particular, with section 33 which deals with the voluntary certification of the completion of a subcontract.

Section 25 allows full payment of the price of a totally completed subcontract. It permits the early release of the holdback retained on that subcontract so that the subcontractor does not have to wait until the substantial performance of the contract. Early release of the holdback on a completed subcontract may only be made without jeopardy by all payers from the owner on down where that subcontract has been certified as complete.

Discussion Draft Provision:

26.-(1) Where a subcontract has been certified or declared complete under section 34, each payer upon the contract or a subcontract may, without jeopardy, make payment reducing the holdbacks required by section 23 to the extent of the amount of holdback he has retained in respect of the completed subcontract where,

(a) all liens in respect of the completed subcontract have expired as provided in Part V or have been satisfied or discharged; and

(b) the payer has not received notice that such payment will

Section 25.....

However, under section 26, the immediate payer on a subcontract may release the holdback that he has retained, once all liens under that subcontract have expired. Unless preserved, all liens under a completed subcontract will expire 45 days after the last supply of services or materials under that subcontract. Thus the immediate payer may release the holdback that he has retained, even if the subcontract is not certified to be complete.

The Discussion Draft provided for a mandatory system of certification. The Committee is of the view that the mandatory certification of completed subcontracts would impose an intolerable administrative burden on the industry. The scheme in the Committee Draft is voluntary.

Subsection 2 of the Discussion Draft has been deleted as unnecessary, since the Committee proposed the removal of the joint trust account provisions. See notes under the subtitle "Section 24 of the Discussion Draft" (deleted), supra.

or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

(2) Where the holdback to be reduced under subsection 1 is deposited in a joint account, the account shall be reduced by the holdback retained in respect of the subcontract certified or declared as complete, including a share of accrued interest earned to the date payment.

Mechanics' Lien Act Provision:

12.-(3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction of that architect, engineer or other person has been given to that subcontractor, then, for the purposes of subsections 22(1), (2) and (3), section 26 and section 27, that subcontract and any materials placed or furnished or to be placed or furnished thereunder and any work done or to be done thereunder shall, so far as concerns any lien thereunder of that subcontractor, be deemed to have been completed or placed or furnished not later than the time at which the certificate was so given.

26. Each payer upon the contract or a subcontract may, without jeopardy, make payment of the holdback he is required to retain by subsection 22(1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment in court).

Section 26

This section is basically the same as section 27 of the Discussion Draft which was designed to replace subsection 12(8) of the Mechanics' Lien Act. It specifies the conditions under which the basic holdback required by subsection 22(1) may safely be paid out without risk of further liability to the lien claimants. The section must be read in conjunction with Part V of the Act which deals with expiry of liens and the certification of the substantial performance of the contract.

Discussion Draft Act Provision:

27.-(1) A payer upon a contract or subcontract may, without jeopardy, make payment of the holdback required by subsection 1 of section 23 (basic holdback) so as to discharge all claims in respect of that holdback, where,

(a) all liens which may be claimed against that holdback have expired as provided in Part V, or have been satisfied or discharged; and

Section 26.....

Section 26 has been redrafted in conformity with the earlier suggestions of the Committee to delete the concepts of the notice of breach of trust and the joint trust account.

(b) the payer has not received notice that such payment will or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

(2) Where the holdback to be paid under subsection 1 is deposited in a joint account, shares of the accrued interest shall also be paid.

Mechanics' Lien Act Provision:

12.-(8) Payment of the percentage required to be retained under this section may be validly made so as to discharge all claims in respect of such percentage after the expiration of the period of thirty-seven days mentioned in subsection (1) unless in the meantime the appropriate steps have been taken to preserve the lien as provided by sections 24 and 26, or 25 and 27, as the case may be, in which case the owner may pay the percentage into court in the proceedings, and such payment constitutes valid payment in discharge of the owner to the amount thereof.

Section 27.....

27. Each payer upon the contract or a subcontract may, without jeopardy, make payment of the holdback he is required to retain by subsection 22(2) (holdback for finishing work) so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment in court).

Section 27

Section 27 is basically the same as section 28 of the Discussion Draft. It corresponds to section 26, but pertains to the holdbacks retained in respect to services or materials supplied between the date certified to be the date of substantial performance of the contract and the date of the completion of the contract. This provision only applies where the contract has been certified or declared to be substantially performed in accordance with section 32.

The section has also been amended to reflect the suggestions of the Committee concerning the notice of breach of trust and the joint trust account.

Discussion Draft Provision:

28. The payer upon a contract or subcontract may, without jeopardy, make payment of the holdback required by subsection 2 of section 23 (holdback for finishing work) so as to discharge all claims in respect of that holdback, where,

(a) all liens which may be claimed against that holdback have expired, as provided in Part V, or have been satisfied or discharged; and,
(b) the payer has not received notice that such payment will or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

28. Where an owner, contractor or subcontractor makes a payment without obligation to do so to any person having a lien for or on account of any amount owing to that person for services or materials supplied to the improvement and gives written notice of the payment or his intention to pay to the proper payer of that person, the payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer of that person, but no such payment reduces the amount of the holdback required to be retained under this Part or reduces the

Section 28

This section is substantially the same as section 29 of the Discussion Draft, which was derived from section 13 of the Mechanics' Lien Act. It permits payment to be made to a subcontractor with whom the person making the payment has no direct contractual relationship. Upon making the payment, an equal amount to the amount so paid may be withheld by the person who made the payment from the person who was supposed to pay the claimant. Notice of any

Discussion Draft Provision:

29. Where an owner, contractor or subcontractor makes a payment without obligation to do so to any person having a lien for or on account of any debt justly due to that person for services or materials supplied to the improvement and promptly gives notice of the payment to the proper payer of that person, the payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer of that person but not so as to affect the holdback.

Section 28.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
amount that must be retained in response to any written notice of a lien given by a person other than the person to whom payment is made.	such payment must be given to the proper payer of the person paid, but under the proposed Act it will be possible to give this notice either before or after making the payment. Although the Committee was of the view that the corresponding provision in the Mechanics' Lien Act is rarely used, it was decided that the option of making payments directly to a person claiming a lien should be made available. The section has also been amended in order to make it clear that a payment so made does not reduce the amount of the holdback required to be retained.	Mechanics' Lien Act Provision: 13. If an owner, contractor or subcontractor makes a payment to any person entitled to a lien under section 6 for or on account of any debt, justly due to him for work done or for materials placed or furnished to be used as therein mentioned, for which he is not primarily liable, and within three days afterwards gives written notice of the payment to the person primarily liable, or his agent, the payment shall be deemed to be a payment on his contract generally to the contractor or subcontractor primarily liable but not so as to affect the percentage to be retained by the owner as provided by section 12.
29. Payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid.	Section 29 Section 29 is identical to section 30 of the Discussion Draft. The provision make it clear that the payments made in accordance with Part IV discharge the liens on a dollar-for-dollar basis.	Discussion Draft Provision: 30. Payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid.

Section 30.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
30. Where the contractor or a subcontractor defaults in the performance of his contract or subcontract, a holdback shall not be applied by any payer toward obtaining services or materials in substitution for those that were to have been supplied by the person in default, nor in payment or satisfaction of any claim against the person in default, until all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment in court).	Section 30 This section is unaltered from the corresponding provision in the Discussion Draft, section 31. The section was derived from section 12(10) of the Mechanics' Lien Act. It prevents the holdback, which represents part of the value of the services and materials already supplied, from being used to satisfy any claims related to a default under a contract or subcontract, unless all lien claimants are paid or provided for under section 44 or the time for preserving their liens has expired. If the time for preservation of the liens has expired and no liens have been preserved, the holdback retained in respect of the defaulting contractor or subcontractor may then be used for set-off. See notes under section 17.	Discussion Draft Provision: 31. Where the contractor or a subcontractor defaults in the performance of his contract or subcontract a holdback shall not be applied by any payer toward obtaining services or materials in substitution for those that were to have been supplied by the person in default, nor in payment or satisfaction of any claim against the person in default, until all liens which may be claimed against that holdback have expired, as provided in Part V, or have been satisfied or discharged. Mechanics' Lien Act Provision: 12.-(10). Where the contractor or subcontractor makes default in completing his contract, the percentage required to be retained shall not, as against any lien claimant who by virtue of subsection (5) has a charge thereupon, be applied by the owner, contractor or subcontractor to the completion of the contract, or for any other purpose nor to the payment of damages for the non-completion of the contract by the contractor or subcontractor nor in payment or satisfaction of any claim against the contractor or subcontractor.

PART V

Expiry, Preservation and Perfection of Liens

31.-(1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section.

(2) Subject to subsection (4), the lien of a contractor,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

(i) the date on which the notice of the certification or declaration of the substantial performance of the contract is published as provided in section 32, and

(ii) the date the contract is completed or abandoned; and

Section 31

This section replaces section 22 of the Mechanics' Lien Act. It is quite different from section 32 of the Discussion Draft.

A major concern addressed in section 32 of the Discussion Draft was the seemingly anomalous situation that exists under the present law with respect to the expiration of lien rights. Under the Mechanics' Lien Act a subcontractor's lien rights often expire long before he can realistically expect payment of the holdback from the contractor. The reason for this is that the lien rights of subcontractors now expire 37 days after the completion of their individual subcontracts. There may be many months before the contract is complete (or even substantially performed) and the holdback can safely be paid by the owner to the contractor so that it can be passed on down the payment stream until it is paid to the subcontractor.

The remedy proposed in section 22 of the Discussion Draft was to have the lien rights of all persons expire a set number of days after the earliest of certain specific events: certification of the completion of subcontract; substantial performance of the contract; abandonment of a contract or subcontract; completion of the contract. When these events occured and the set number of days

Discussion Draft Provision:

32.-(1) Unless preserved under this Part, a lien arising from services or materials supplied to an improvement,

(a) under a subcontract that has been certified or declared to be completed, that has not earlier expired under clause b, expires at the conclusion of the sixty-day period after the day certified or declared to be the date the subcontract was completed;

(b) on or before the day certified or declared to be the date of substantial performance of the contract, that has not earlier expired under clause a or c, expires at the conclusion of the sixty-day period after that day;

(c) under a contract or subcontract that was abandoned, that has not earlier expired under clause b, expires at the conclusion of the sixty-day period after the contract or subcontract was abandoned; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified to be the date of substantial performance , expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

(i) the date the contract is completed, and

(ii) the date the contract is abandoned.

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of,

had elapsed the lien rights of persons whose liens were connected with the events would expire.

After lengthy consideration the Committee concluded that the scheme proposed in section 32 of the Discussion Draft would create more problems than it solved. The effect of the scheme would have been that the lien rights of workers, suppliers and subcontractors would have expired following certain specific events that would be unknown to them, for example, the certification of the completion of a subcontract or the abandonment of a subcontract. After study, the Committee decided that there is no practical system of giving notice of such events. On balance, it is the Committee's view that it is more important for those with lien rights to know when those rights begin to expire than to have a claim period closely related to release of the holdbacks. The Committee believes that it is best to continue to employ a well known test for determining the date when the lien rights of a supplier begin to expire, namely the date of his last supply of services or materials to the improvement. It also believes that the reduction of the holdback to 10 per cent and the extension of the period for retaining the holdback from 37 to 45 days will alleviate much of the hardship that is experienced under the existing Mechanics' Lien Act.

(d) that has not earlier expired under clause a, b or c, expires at the conclusion of the sixty-day period after the contract was completed.

Mechanics' Lien Act Provision:

22.-(1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or of the subcontract or within thirty-seven days after the completion or abandonment of the contract or of the subcontract, as the case may be.

(2) A claim for lien for materials may be registered before or during the placing or furnishing thereof, or within thirty-seven days after the placing or furnishing of the last material so placed or furnished.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty-seven days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the doing of the work for which the wages are claimed

Subsection 31(3).....

(i) the date on which the notice of the certification or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which he last supplies services or materials to the improvement; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five day period next following the date on which he last supplies services or materials to the improvement.

The period for retaining the holdback under section 32 of the Discussion Draft was 60 days. The reaction of the construction industry to this proposal was mixed. Many strongly opposed an increase from the 37 day period under the Mechanics' Lien Act. Others strongly supported a 60 day period. The Committee recommends a 45 day period. It believes this to be a realistic compromise which will be generally acceptable to the industry. Extension of the period from 37 to 45 days will permit all persons having liens to better assess whether there is a need to preserve their liens or allow them to expire. At the same time, when coupled with more specific dates upon which the holdback can safely be released by an owner, the 45 day period will not unduly prolong the period before release of the holdback.

Subsection 2 deals with the expiry of the contractor's lien. In general, the release of the holdback will coincide with the expiry of the contractor's lien.

Clause a deals with the expiry where the contract has been certified as substantially performed. Lien rights against the holdback for the services and materials supplied up to and including the date certified as the date of substantial performance (normally the date of contractor applies for certification) expire 45 days after the earlier of the publication of the certificate of substantial performance in a construction trade newspaper or the completion or abandonment of the contract.

or within thirty-seven days after the last work was done for which the lien is claimed.

Subsection 31(3).....

Clause b deals primarily with the expiry of liens where there is no certification or declaration of substantial performance, and where there has been certification, it deals with the expiry of the liens that arise from any supply of services or materials made after the date certified as the date of substantial performance of the contract. These liens expire 45 days after the earlier of the date of the completion of the contract or the date of the abandonment of the contract.

Subsection 3 deals with the expiry of the lien of any person other than the contractor. Clause a deals with the expiry where the contract (the main contract) has been certified as substantially performed. The liens of all persons for the services and materials supplied up to and including the date certified as the date of substantial performance expire 45 days after the earlier of the publication of the notice of substantial performance or the last supply by the person of services or materials.

Clause (3)(b) deals with expiry where there is no certification of substantial performance and, where there has been certification, it deals with the expiry of liens arising from any supply of services and materials made during the time between the date certified as the date of substantial performance and the completion of the contract. Liens expire 45 days after the last date on which the person last supplies services or materials.

Subsection 31(4).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(4) Where a person has supplied services or materials to an improvement on or before the day certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, his lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that he may have for the supply of services or materials after that date.	Subsection 4 is similar to subsection 32(2) of the Discussion Draft. It deals with the situation where a person begins his supply of services or materials before the date certified as the date the contract was performed and continues to make supplies to the improvement after that date. In that case, the lien of the person is divided into two lien rights. The lien for the services or materials supplied before the date certified as the date on which the contract is substantially performed expires in accordance with clause (3)(a). The lien for the the services or materials supplied after that date expires in accordance with clause (3)(b), that is, 45 days after the last supply.	Discussion Draft Provision: (2) Where a person has supplied services or materials to an improvement on or before the day certified or declared to be the date of substantial performance of the contract and also has supplied or is to supply services or materials after that date, his lien arising out of the services or materials supplied on or before that date expires as provided in clause b of subsection 1 without affecting any lien he may have for the supply of services or materials after that date.
(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring, (a) the date on which he last supplied services or materials under that contract or subcontract; and (b) that he will not supply any further services or materials under that contract or subcontract, then the facts so stated shall be deemed to be true against the person making the declaration.	Subsection 5 is new. It follows from the Committee's recommendation that lien rights expire after the last supply of services and materials and its recommendation that persons not be permitted to waive their lien rights. It is the Committee's view that it is necessary to have a statutory mechanism for determining when the lien rights expire. Where a person signs a declaration stating his last day of supply and that he will not supply any further services or materials that declaration will be deemed to be true against him. His lien will expire 45 days from the date set out in the declaration, unless he preserves it within that time.	

Section 32.....

32.-(1) The following rules govern the certification and declaration of the substantial performance of a contract:

1. On the application of the contractor, the payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed in accordance with section 2, and where he or they so determine, shall certify the substantial performance of the contract by signing a certificate in the prescribed form.
2. The payment certifier or the owner and the contractor jointly, as the case may be, shall set out in the certificate the date on which the contract was substantially performed.
3. The date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of this Act to be the date on which that event occurred.
4. Where the payment certifier certifies the substantial performance of a contract he shall within seven calendar days of the day the certificate is signed give or send a copy of the certificate to the owner and to the contractor.

Section 32

In substance, Section 32 is largely derived from section 33 of the Discussion Draft. The purpose of section 32 is to provide a method of determining conclusively the date of substantial performance. The concept of substantial performance was incorporated into the Mechanics' Lien Act by the 1968-69 revisions to that Act, upon the recommendation of the Law Reform Commission. Prior to the incorporation of the substantial performance concept, the release of the holdback could not be made until the completion of the work to be done under the contract. Consequently, the release of the holdback was often delayed, pending the completion of a trivial amount of finishing work, even after the improvement was being used for the purpose intended. This was a source of great hardship to the industry. The burden which the holdback imposes increases in direct proportion to the length of time that the holdback is retained. However, the benefit of the holdback decreases as the project nears completion, because the chances of either the contractor or a principal subcontractor becoming insolvent at this stage of the project are low.

The purpose of the inclusion of the substantial performance concept was to speed the release of the holdback, particularly in the case of major building projects. It was intended that,

Discussion Draft Provision:

33.-(1) The following rules govern the certification and declaration of the substantial performance of a contract:

1. The payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed and where he or they so determine, shall certify the substantial performance of the contract.
2. The day on which the payment certifier or the owner and contractor jointly, as the case may be, reach a determination that the contract is substantially performed shall be the day set out in the certificate, and that day is deemed to be the day the contract was substantially performed.
3. Within seven days of the day of substantial performance, the person or persons who have certified it shall,
   (a) give or send a copy of the certificate to the owner and the contractor and to any other person who, prior to the

Subsection 32(1).....

5. The contractor shall publish a copy of the certificate once in a construction trade newspaper.
6. Where the contractor does not publish a copy of the certificate within seven days of receiving a copy of the certificate signed by the payment certifier or, where there is no payment certifier, signed by the owner, any person may publish a copy of the certificate.
7. Where there is a failure, or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.
8. Unless the court otherwise orders, the day the declaration is made shall be deemed to be the day the contract was substantially performed.

in general, the holdback retained under a contract would be released 37 days after the substantial performance of the contract, rather than upon the completion of the work to be done under that contract.

Unfortunately, the doctrine of substantial performance has not worked as well as had been hoped. Because of the obscurity and ambiguity of the terms of the Mechanics' Lien Act, the true legal effect of the substantial performance provisions in that Act were unclear. Furthermore, there was no precise method provided under that Act for fixing the date of substantial performance of the contract, or of notifying affected parties of that date. Section 32 is designed to remedy these problems.

The procedure set out in section 32 may be summarized as follows: The date of substantial performance is to be determined by either the payment certifier on the contract, or where there is no payment certifier, by the owner and the contractor jointly. That date must be set out in a formal certificate of substantial performance. The date set out in the certificate is conclusively presumed to be the date of substantial performance. This will normally be the date the contractor applied for certification. The contractor is required to publish a copy of this certificate once, in a construction trade news-

certification of substantial performance of the contract, personally served the person who has certified substantial performance with a request for a copy of the certificate; and

(b) post a copy of the certificate at the site office, where there is one, and where it is feasible to do so at each ordinary point of access to the job site.

4. Where there is a failure or refusal to certify substantial performance of the contract, any person may apply to the court, which upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and such declaration has the same force and effect as a certificate of substantial performance of the contract.
5. Unless the court otherwise orders, the day the declaration is made

Subsection 32(1).....

9. The person who applied to the court shall publish a copy of the declaration of substantial performance once in a construction trade newspaper.

paper. Should he fail or refuse to do so, a copy of the certificate may be published by any other interested person, such as the owner or a subcontractor. The newspaper is required to publish these certificates in accordance with the regulations.

The 45 day lien period provided for in clause 31(2)(a) begins to run from the date of publication. Under Part VI of the Act, all persons are provided with a right to require the contractor to inform them in writing of the date of publication and the name of the construction trade newspaper in which the certificate was published. If there is no publication, the lien period will not begin to run until the completion or the abandonment of the contract. At the end of the lien period, the basic holdback retained under section 22(1) of the Act may be released, provided that all liens that may be claimed against that holdback have expired or have been satisfied, discharged or provided for under section 44 (payment into court).

It should be noted that the Committee's proposal differs significantly in procedure from the proposals contained in section 33 of the Discussion Draft. Section 33 provided for the mailing of copies of the certificate to all persons who requested such a copy, and also provided for the posting of copies of the certificate on the job site. The Committee is of the view that the proposals in the Discussion Draft would impose a substantial administrative burden and yet would not provide adequate notice. Publication of a copy of the certificate in a construction trade newspaper, on the other hand, will provide a universally accessible form of notice to all who wish to be informed of the substantial performance of the contract.

shall be deemed to be the day the contract was substantially performed.

Subsection 32(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) Every certificate or declaration made or given under this section shall contain, (a) the name and address for service of the owner and of the contractor; (b) the name and address of the payment certifier, where there is one; (c) a short description of the improvement; (d) the date on which the contract was substantially performed; (e) where the lien attaches to the premises, a concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises; and (f) the street address, if any, of the premises.	Subsection 2 prescribes the contents of a certificate of substantial performance. In general, it is the same as section 33(1)[6] of the Discussion Draft. There is, however, one important modification. Subsection 2 does not require the certificate to include a legal description of the premises. The Committee is of the view that such a requirement is excessive. A legal description can be long, and the Committee was concerned about the legal consequences of an innocent misdescription of the premises. Instead, the Committee recommends that the cerficate contain only a reference to a lot and plan or instrument registration number sufficient to identify the premises. This will facilitate the registration of liens and will not entail the obvious administrative problems of including a full legal description of the premises in the certificate.	Discussion Draft Provision: 6. Every certificate or declaration made or given under this section shall contain, (a) the name and address of the owner and of the contractor; (b) the name and address of the payment certifier, where there is one; (c) a short description of the improvement; (d) the day the contract was determined or declared to be substantially performed; (e) where the lien attaches to premises, a description of the premises sufficient for registration under The Land Titles Act or The Registry Act, as the case may be; (f) the street address, if any, of the premises.
(3) Any person who is required by this section to make a determination of the substantial performance of a contract, and who after receiving an application fails or refuses within a reasonable time to certify the substantial performance of the contract even though there is no reasonable doubt that the contract has, in fact, been substantially performed, is liable to anyone who suffers damages as a result.	Subsections 3 and 4 are derived from subsection 33(2) of the Discussion Draft. In the interest of simplicity, the two clauses of section 33(2) of the Discussion Draft have been	Discussion Draft Provision: (2) Any person who is required by this section to make a determination of the substantial performance of a contract, and who

Subsection 32(4).....

(4) A payment certifier who fails to comply with paragraph 4 of subsection 32(1) is liable to anyone who suffers damage as a result.

(5) A construction trade newspaper shall publish copies of certificates or declarations of substantial performance in the prescribed form and manner.

divided into separate subsections. In substance, subsection 3 has been amended slightly so as to make it clear that the certification of substantial performance must take place within a reasonable time of its ocurrence. This subsection provides for the personal liability of any person required to certify a contract but who fails to do so, where there is no reasonable doubt that the contract is substantially performed.

Subsection 4 is a restatement of the substantive effect of clause 33(2)(b) of the Discussion Draft.

fails or refuses,

(a) to certify the substantial performance of the contract even though there is no reasonable doubt that the contract has, in fact, been substantially performed; or

(b) to give or send a copy of the cerficate of the substantial performance of the contract to a person entitled to receive a copy of it,

is liable personally to anyone who suffers damage as a result.

33.-(1) Upon the request of the contractor, the payment certifier on the contract may determine whether a subcontract has been completed, and where he so determines, he may certify the completion of the subcontract in the prescribed form.

(2) Within seven days of the date certified to be the date of the completion of the subcontract, the payment certifier shall give or send a copy of the certificate,

(a) to the subcontractor whose subcontract has been certified as complete; and

(b) to the owner and the contractor.

Section 33

Section 33 replaces section 34 of the Discussion Draft. Section 34 provided for a comprehensive and mandatory procedure for the certification of the completion of subcontracts. Upon certification of a subcontract, the lien periods of all suppliers would have begun to expire, and the holdback retained in respect of that subcontract would have become payable once those liens had expired or had been satisfied or discharged.

The Committee is of the opinion that a mandatory scheme for the certification of the completion of subcontracts is not practical. In most cases, it is very difficult to determine the date of such completion with accuracy. Furthermore, a mandatory scheme of certification would be an extremely expensive burden for the industry to bear.

Discussion Draft Provision:

34.-(1) The following rules govern the certification and declaration of the completion of a subcontract:

1. The payment certifier, upon the request of the contractor, or if there is no payment certifier, the owner and the contractor jointly, shall determine whether a subcontract has been completed, and where he or they so determine, shall certify the completion of the subcontract.
2. The day on which the payment certifier, or where there is no payment certifier, the owner and contractor jointly, reach a determination

Subsection 33(2).....

To make the system work, it would be necessary for the owner or payment certifier to be familiar with the terms of all subcontracts. Given the fact that there may be seventy or more subcontracts in the construction of even a small apartment building, this would not be practical.

As discussed under section 31, the mandatory certification scheme would have resulted in subcontractors, material suppliers and workers who had supplied a subcontractor whose subcontract had been certified, losing their lien rights without an adequate mechanism for determining that the subcontract had been certified as complete. Instead of the proposed mandatory scheme, the Committee is of the view that the new Act should provide for a voluntary system of certification. Such a system is already in effect under section 12(2) of the Mechanics' Lien Act. While this system is not often used, it may be of advantage in some cases.

It should be noted that a subcontract may not be certified as complete until all materials and services provided for in the subcontract have been supplied. Under the Committee Draft, the concept of substantial performance does not apply to subcontracts.

that the subcontract is complete shall be set out in the certificate, and that day shall be deemed to be the day on which the subcontract was completed.

3. Within seven days of the completion of the subcontract, the person or persons who have certified it shall give or send a copy of the certificate to the subcontractor whose subcontract has been certified as complete, and to each person required to retain a holdback in respect of that subcontract.
4. Where there is a failure or refusal to certify completion of a subcontract, any interested person may apply to the court, which, upon being satisfied that the subcontract is complete and upon such terms as to costs or otherwise as it considers fit, may declare that the subcontract has been completed, and such declaration has the same force and effect as a certificate of the completion of the subcontract.

Subsection 33(2).....

5. Unless the court otherwise orders, the day the declaration is made is deemed to be the day on which the subcontract was completed.
6. Every certificate or declaration made or given under this section shall contain,
   (a) the name and address of the owner and of the contractor;
   (b) the name and address of the payment certifier, where there is one;
   (c) a short description of the services or materials that were supplied under the subcontract;
   (d) the day on which the subcontract was determined or declared to be complete;
   (e) where the lien attaches to the premises, a description of the premises sufficient for registration under The Land Titles Act or the The Registry Act, as the case may be; and
   (f) the street address, if any, of the premises.

Subsection 33(2).....

(2) Any person who is required by this section to make a determination of the completion of a subcontract, and who fails or refuses,

(a) to certify the completion of the subcontract, even though there is no reasonable doubt that the subcontract has, in fact, been completed; or

(b) to give or send a copy of the certificate of completion to a person entitled to receive a copy of it,

is liable personally to anyone who suffers damage as a result.

(3) Where a subcontract is certified or declared complete, all services or materials supplied by any person in the completion of the subcontract are, for the purpose of clause a of subsection 1 of section 32 (expiry of unpreserved liens), supplied under the subcontract.

Mechanics' Lien Act Provision:

12.-(2) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and thirty-seven days have elapsed after a certificate issued by that

Subsection 33(2).....

architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 15 per cent of the subcontract price or, if there is no specific subcontract price, by 15 per cent of the actual value of the work done or materials placed or funished under that subcontract, but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act.

(3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction of that architect, engineer or other person has been given to that subcontractor, then, for the purposes of subsections 22(1),(2) and (3), section 26 and section 27, that subcontract and any materials placed or furnished or to be placed or furnished thereunder and any work done or to be done thereunder shall, so far as concerns

Subsection 33(2).....

any lien thereunder of that subcontractor, be deemed to have been completed or placed or furnished not later than the time at which the certificate was so given.

(4) Where an architect, engineer or other person neglects or refuses to issue and deliver a certificate upon which payments are to be made under a contract or subcontract, the judge or officer having jurisdiction to try an action under this Act, upon application and upon being satisfied that the certificate should have been issued and delivered may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the work or materials to which the certificate would have related has been done or placed or furnished, as the case may be, and any such order has the same force and effect as if the certificate had been issued and delivered by the architect, engineer or other person.

34.-(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and

Section 34

This section is derived from section 35 of the Discussion Draft, and consolidates and replaces a number of provisions of the Mechanics' Lien Act. It deals with the preservation of a lien. The lien created by the Act is of a temporary nature, and has been noted, it will expire unless certain

Discussion Draft Provision:

35.-(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attaches to the premises by the registration in proper land registry office of a

(b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien together with the affidavit of verification required by subsection (6).

procedural steps are taken to continue it. The preservation of a lien is one such step.

The term "preservation" has been used to denote the temporary continuation of a lien. Until 1975, a lien created by the Mechanics' Lien Act would expire unless it was registered against the title to the premises by the claimant within 37 days of the completion of his contract or subcontract, or in the case of a worker or a materialman, the date of his last supply of services or materials to the improvement. In 1975, the Act was made binding on the Crown, but in the case of an improvement to Crown land or to a municipal street or highway, the lien does not attach to the premises. For this reason there is no requirement for the registration of a lien in the case of public works or the improvement of municipal streets or highways. Instead, a lien was continued by the giving of written notice of the lien claim to the owner. The term "preservation" is used in the Act to connote both methods of temporary continuation: the giving of a copy of the claim for lien in the case of the Crown, and municipal streets, and the registration of a claim for lien in all other cases.

Subsection 34(1), like subsection 35(1) of the Discussion Draft, is derived from subsections

claim for lien in accordance with this Part, and upon giving notice of the claim for lien to the owner; and

(b) where the lien does not attach to the premises, by giving to the owner notice of the claim for lien in accordance with this Part.

Mechanics' Lien Act Provision:

17.-(1) A claim for a lien may be registered in the proper land registry office and shall set out,

(a) the name and an address for service of the person claiming the lien and of the owner or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land, and of the person for whom the work was or is to be done, or the materials were or are to be placed or furnished, and the time within which the same was or was to be done or placed or furnished;

Subsection 34(1).....

17(1), 24(1) and 25(1) of the existing Mechanics' Lien Act. It should be noted that where clause 34(1)(a) applies, the claim for lien must be registered against the correct premises. This requirement is not modified by section 6, the substantial compliance provision of the Act. In the opinion of the Committee a failure to register a lien against the correct premises ought to be a fatal flaw in the enforcement of a claim. Thus the Committee Draft should be taken as overruling the decision to the contrary effect in Nor-Min Supplies Ltd. v. CNR.

It should be noted that subsection (1) of the Committee Draft retains one of the major proposals that was made in the Discussion Draft: it will no longer be possible to preserve a lien prior to the time when it arises. Under the Mechanics' Lien Act, it was possible to register a lien before the supply of materials or the doing of work. From a legal point of view, it is objectionable for a person to be permitted to preregister a right which he has yet to acquire. From a practical point of view this right has lead to claims far in excess of the work done, to the general prejudice of everyone involved in a construction project. The need for including the full amount

(b) a short description of the work done or to be done, or the materials placed or furnished or to be placed or furnished;
(c) the sum claimed as due or to become due;
(d) a description of the land as required by the Land Titles Act or the Registry Act and the regulations thereunder, as the case may be; and
(e) the date of expiry of the period of credit if credit has been given.

24.-(1) Every lien for which a claim is not registered ceases to exist on the expiration of the time limited in section 22 for the registration thereof.

25. Where the lien does not attach to the land by virtue of subsection 6(2), every lien for which notice has not been given as required by section 23 ceases to exist at the expiration of the time limited in section 23 for giving notice of claim thereof.

Subsection 34(2).....

for materials or services to be supplied arises under the present Mechanics' Lien Act, because it permitted a lien claimant to make only one lien claim in respect of all services and materials that he had supplied or was to supply under his contract or subcontract. The Committee Draft, like the Discussion Draft, allows a claim for lien for only services and materials that have been supplied. However, where further services materials are supplied by a lien claimant another lien can be preserved by him.

It should also be noted that the requirement for serving the owner with a copy of the lien claim under clause 35(1)(a) of the Discussion Draft has been deleted. The Committee was of the view that such a requirement was unnecessary.

(2) Where a claim for lien is in respect of a public street or highway owned by a municipality, the copy of the claim for lien and affidavit shall be given to the clerk of the municipality.

(3) Where the owner of the premises is the Crown, the copy of the claim for lien and affidavit shall be given to the office prescribed, by regulation, or where no such office has been prescribed to the ministry or Crown agency for whom the improvement is made.

Subsections 2 and 3 are generally similar to subsections 23(3) and (4) of the Mechanics' Lien Act. One minor change, however, is that instead of giving a notice of the claim, the person claiming the lien is required to give a copy of the claim. Note that an affidavit of verification must also be served.

Discussion Draft Provision:

(2) Where a claim for lien is in respect of a public street or highway owned by a municipality, the notice of claim for lien shall be given to the clerk of the municipality.

(3) Where a claim for lien is in respect of a public work, it shall be given to the Ministry or Crown agency for whom the improvement is done, or to such office as is prescribed by the regulations.

Mechanics' Lien Act Provisions:

(3) Where the claim is in respect of a public street or highway owned by a municipality, the notice required to be given to the owner by subsection (2) shall be given to the clerk of the municipality.

Subsection 34(4).....

(4) Where the premises is a railway right-of-way, the copy of the claim for lien and affidavit shall be given to the manager or any person apparently in charge of any office of the railway in Ontario.

Subsection 4 is a new provision and deals with lien claims arising from improvements to railway rights-of-way. See section 16.

(4) Where the claim is in respect of a public work, the notice required by subsection (2) to be given to the owner shall be given to the Ministry or Crown agency for whom the work is done or the materials are placed or furnished, or to such office as is prescribed by the regulations.

(5) Every claim for lien shall set out,

(a) the name and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which those services or materials were supplied;
(b) a short description of the services or materials that were supplied;
(c) the contract price or subcontract price;
(d) the amount claimed in respect of services or materials that have been supplied; and
(e) a description of the premises,
(i) where the lien attaches to the premises, sufficient for registration under the Land Titles Act or the Registry Act, as the case may be, or
(ii) where the lien does not attach to the premises, being the address or other identification of the location of the premises.

Subsection 5 replaces subsection 34(4) of the Discussion Draft. It states the details which must be set out in a claim for lien. It is derived from section 17(1) of the Mechanics' Lien Act. The Committee is of the opinion that clauses 34(4)(c) and (d) of the Discussion Draft should be replaced to make it clear that the claim for lien is limited to services or materials that have already been supplied to the improvement. It is hoped that these changes will eliminate any confusion that might result from the change from the existing practice of asserting the full price as the amount claimed in a claim for lien.

Discussion Draft Provision:

(4) Every claim for lien shall set out,
(a) the name and and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which the services or materials were supplied;
(b) a short description of the services or materials that were supplied;
(c) the price of services or materials that were supplied;
(d) the amount claimed as owing; and
(e) a description of the premises,
(i) where the lien attaches to the premises, sufficient for registration under The Land Titles Act or The Registry Act, as the case may be, or

Subsection 34(5).....

(ii) where the lien does not attach to the premises, the address or a description of the location of the premises.

Mechanics' Lien Act Provision:

17.-(1) A claim for a lien may be registered in the proper land registry office and shall set out,

(a) the name and an address for service of the person claiming the lien and of the owner or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land, and of the person for whom the work was or is to be done, or the materials were or are to be placed or furnished, and the time within which the same was or was to be done or placed or furnished;

(b) a short description of the work done or to be done, or the materials placed or furnished or to be placed or furnished;

(c) the sum claimed as due or to become due;

(d) a description of the land as required by the Land Titles Act or the Registry Act and the regulations thereunder, as the case may be; and

(e) the date of expiry of the period of credit if credit has been given.

Subsection 34(6).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(6) A claim for lien shall be verified in duplicate by an affidavit of the person claiming the lien, including a trustee of the workers' trust fund where subsection 87(2) applies, or of an agent or assignee of the claimant who has informed himself of the facts set out in the claim, and the affidavit of the agent or assignee shall state that he believes those facts to be true.	Subsection 6 is a change from both subsection 17(2) of the Mechanics' Lien Act and subsection 34(5) of the Discussion Draft. Both of these provisions required an agent or assignee to have personal knowledge of the matters required to be verified. Given the magnitude of projects and the realities of contemporary corporate organization, it is often impossible for any one person to have personal knowledge of all the facts surrounding the claim. This is particularly true where the claimant is a corporation. The new requirements are that the agent or assignee shall inform himself of the facts set out in the claim and that he must believe those facts to be true. In a recent Divisional Court decision, Ken Gordon Excavating Ltd. v. Edston Construction Ltd., et al., the court held that an affidavit of verification was not required for the proper preservation of a lien, because of the substantial compliance provisions of the Mechanics' Lien Act. The Committee is strongly of the view that an affidavit of verification should be mandatory, in the hope that this will help to prevent spurious and exaggerated claims that prejudice all persons on a project.	Discussion Draft Provision: (5) Except as provided in subsection 6 a claim for lien shall be verified in duplicate by an affidavit of the person claiming the lien, or of an agent or assignee who has personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge. Mechanics' Lien Act Provision: (2) The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

Subsection 34(6).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	Subsection 35(6) of the Discussion Draft (deleted): Subsection 35(6) of the Discussion Draft providing for verification of a claim for lien by a trustee of a worker's trust fund is no longer necessary because of the Committee's revision of 34(5) of the Committee Draft. A claim for lien can now be verified by any agent or assignee who informs himself of the facts set out in the claim and states his belief in the truth of those facts.	Discussion Draft Provision: (6) Where a claim for lien is made by a trustee of a worker's trust fund on behalf of the fund, the claim for lien shall be verified in duplicate by an affidavit and the claim may be for the amount that the trustee has reasonable and probable grounds to believe are owed to the fund and are recoverable by virtue of the lien and the affidavit shall state the sources of his information.
(7) Subject to subsection 44(4) (apportionment), a general lien shall be preserved against each of the premises that the person having the lien desires the lien to continue to apply against, and the claim against each premises may be for the price of services or materials that have been supplied to all the premises.	Section 34 Of The Committee Draft (Continued) Subsection 7 is similar to subsection 35(7) of the Discussion Draft. It provides for the preservation of general liens.	Discussion Draft Provision: (7) A general lien shall be preserved against each of the premises that the person having the lien desires the lien to continue to apply against and the claim against each premises may be for the price of services or material that have been supplisd to all the premises.
(8) Any number of persons having liens upon the same premises may unite in a claim for lien, but where more than one lien is included in one claim, each person's lien shall be verified by affidavit as required by subsection (6).	Subsection 8, like subsection 35(7) of the Discussion Draft, is derived from subsection 18(1) of the Mechanics' Lien Act. It provides for the uniting of the liens of several persons in one claim. The reference to general liens in subsection 18(1) has been deleted as it has been dealt with elsewhere in the Committee Draft [see, subsections 34(6) and 44(4)].	Discussion Draft Provision: (8) Any number of persons having liens upon the same premises may unite in a claim for lien but, where more than one lien is included in one claim, each person's lien shall be verified by affidavit as provided in subsections 5 and 6.

Subsection 34(8).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		Mechanics' Lien Act Provision: 18.-(1) A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but, where more than one lien is included in one claim, each claim for lien shall be verified by affidavit as provided in section 17.
35. In addition to any other ground on which he may be liable, any person who preserves a claim for lien or who gives written notice of a lien, (a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or (b) where he knows or ought to know that he does not have a lien, is liable to any person who suffers damage as a result.	Section 35 Section 35 is derived from section 36 of the Discussion Draft. No similar provision is found in the Mechanics' Lien Act. The purpose of section 35 is to deter exaggerated lien claims. While the Discussion Draft would have imposed liability only in respect of preserved lien claims, section 35 also imposes liability where a lien claimant serves written notice of a lien claim for an exaggerated amount. The Committee is of the view that the giving of such notice may also be highly injurious to the industry since it will often result in a stoppage in the flow of the monies that are being used to finance construction. Under the present law, the common law cause of action of slander of title is available to the owner where an exaggerated lien claim has been registered. Unfortunately, it is not available to other persons who may be injured as a result of an exaggerated claim. The Committee believes that it is desireable to provide for a statutory	Discussion Draft Provision: 36. In addition to any other ground on which he may be liable, any person who preserves a claim for lien, (a) for an amount grossly in excess of the amount which he is justly owed; or (b) where he knows or ought to know that he does not have a lien, is liable to any person who suffers damage as a result.

Section 35.....

remedy for all those who may be injured as a result of an exaggerated claim for lien. It is also of the opinion that such a remedy will be a highly effective deterent to the assertion of unreasonable claims.

36.-(1) A lien may not be perfected unless it is preserved.

Section 36

This section deals with the steps that must be taken to keep a preserved lien from expiring. It is derived from sections 26 and 27 of the Mechanics' Lien Act.

As in subsection 37(1) of the Discussion Draft, subsection 1 of this section provides that a lien cannot be perfected unless it is preserved. This limitation has its greatest impact with respect to the concept of sheltering. Under this concept, which is clarified in subsection 4 of this section, a person's lien may be perfected by the commencement of an action (perfection) in respect of another lien. The Court of Appeal has held that under the existing Mechanics' Lien Act the commencement of an action to enforce a lien would perfect all liens that were in existence at the time when the certificate of action was registered, regardless of whether those liens had also been registered. This has led to confusion. Under the Committee Draft only a preserved lien is capable of being perfected.

Discussion Draft Provision:

37.-(1) A lien may not be perfected unless it is preserved.

Subsection 36(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five day period next following the last day, under section 31, on which the lien could have been preserved.	Subsection 2 is different from subsection 37(2) of the Discussion Draft in that the number of days for perfecting a lien has been reduced from 60 to 45. The time runs, as it did in the Discussion Draft, from the last day on which the lien could have been preserved. The Committee recommended the reduction of the time for perfection to 45 days in order to shorten the period during which the title to the premises was in doubt. It believes that this may be done without prejudicing the legitimate rights of any lien claimant. In substance, the Committee's recommendation is that the time for perfection of a lien should remain roughly the same as it is under the existing Mechanics' Lien Act, but should be divided differently. The existing Act divides the 90 day total period into 37 days for the preservation of a lien and a further 53 days for perfecting it. Under the Committee Draft the time is divided into 45 days for preserving a lien and a further 45 days for perfecting it. Where a lien is perfected during the initial 45 day period, any days remaining in that period are added on to the 45 day perfection period. In addition, where the lien is preserved during the supply of services or materials, the 90 day period for perfection does not begin to run until the commencement of the lien period in respect of that lien under section 31.	Discussion Draft Provision: (2) A lien that has been preserved expires unless perfected prior to the end of the period of sixty days next following the last day on which the lien could have been preserved. Mechanics' Lien Act Provision: 27. Every lien which by virtue of subsection 6(2) does not attach to the land ceases to exist on the expiration of ninety days after, (a) the work has been completed or abandoned; (b) the materials have been placed or furnished; or (c) the expiry of the period of credit, where such period is mentioned in the notice referred to in section 23, unless in the meantime an action under this Act is commenced to realize the claim or in which a subsisting claim may be realized. 26. Every lien for which a claim is registered ceases to exist on the expiration of ninety days after the work has been completed or the materials have been placed or furnished, or after the expiry of the period

Subsection 36(3).....

of credit, where such period is mentioned in the registered claim for lien, unless in the meantime an action is commenced to realize the claim or in which a subsisting claim may be realized, and a cetificate is registered as provided by section 24.

(3) A lien claimant perfects his preserved lien,

(a) where the lien attaches to the premises, when he commences an action to enforce his lien and, except where an order to vacate the registration of his lien is made, he registers a certificate of action in the prescribed form on the title of the premises; or

(b) where the lien does not attach to the premises, when he commences an action to enforce his lien.

Subsection 3 sets out the procedure for perfecting a lien. A lien may be perfected either by the commencement of an action by the lien claimant, or by sheltering under an action commenced by some other lien claimant, in accordance with the rules set out in subsection 4. A lien claimant is not prevented from commencing his own lien action, merely because his lien has incidentally become perfected as a result of the commencement of a lien action by another claimant. Where an action is commenced to perfect a lien that attaches to the premises, a certificate of action must be registered against the title to the premises. A certificate of action should not be registered in the case of a lien which does not attach to the premises.

(3) A person's preserved lien becomes perfected where,

(a) he commences an action to enforce his lien and,

(i) where the lien attaches to the premises, he registers in the proper land registry office a certificate of action in the prescribed form, or

(ii) where the lien does not attach to the premises he gives a copy of the certificate of action to the owner;

(b) another lien on the premises is perfected in accordance with clause a between the time when he preserved his lien and the time when it would have expired under subsection 2.

Subsection 36(4).....

(4) A preserved lien becomes perfected by sheltering under a lien perfected by another lien claimant in respect of the same premises in accordance with the following rules:

1. The preserved lien of a lien claimant is perfected by sheltering under the perfected lien of another lien claimant in respect of the same premises where,
   i. the lien of that other lien claimant was a subsisting perfected lien at the time when the lien of the lien claimant was preserved, or
   ii. the lien of that other lien claimant is perfected in accordance with clause (3)(a) or (b) between the time when the lien of the lien claimant was preserved and the time that the lien of the lien claimant would have expired under subsection (2).

2. The validity of the perfection of a sheltered lien does not depend upon the validity, proper preservation or perfection of the lien under which it is sheltered.

Subsection 4 provides for the perfection of the lien of a claimant by his sheltering under an action commenced in respect of the lien of some other claimant. The concept of sheltering is a complicated one. Its purpose is to alleviate the need for a multiplicity of actions. It permits a preserved lien to become perfected by means of the commencement of a lien action to perfect some other lien in respect of the same improvement. Where a lien is perfected by sheltering, it is not necessary to commence a separate action in respect of that lien, nor is it necessary for that lien claimant to register a certificate of action. This procedure is justified, since many of the liens which are claimed in respect of an improvement involve many of the same issues of fact. While the concept of sheltering is a well-established principle of mechanics' lien law, a number of problems have arisen in respect to its precise application. To correct these problems, the Committee recommends the adoption of the rules set-out in subsection 4.

Paragraph 1 carries into effect the principle enshrined in subsection 1: a lien may not be perfected unless it is preserved. The justification for this rule is discussed in the notes under that subsection. Under the Discussion Draft, a lien might have been sheltered under the perfection of another lien only if the action in respect of that lien was commenced

3. A sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered.

4. Upon notice by a defendant named in a statement of claim, any lien claimant whose lien is sheltered under that statement of claim shall provide the defendant with further particulars of his claim or of any fact alleged in his claim for lien.

during the time when the lien was preserved. The Committee is of the opinion that there is no reason to restrict the availability of sheltering to that great of an extent. Under paragraph 1, a lien will also become perfected by sheltering where there is a subsisting lien action in respect of some other lien at the time when it is preserved.

Paragraph 2 is intended to protect the sheltered lien from any defect in the lien under which it is sheltered. In the opinion of the Committee, a person who perfects his lien by sheltering cannot realistically be expected to investigate the merits of the lien claim under which he has sheltered, nor to determine whether that lien was preserved or perfected within the time allowed under the Act.

The purpose of paragraph 3 is to clarify the scope of the protection afforded by sheltering. It is the Committee's view that sheltering should not apply to protect claims underlying a sheltered lien where the claim is wholly different in nature to the claims in the action under which it is sheltered. To permit wholly different claims to be sheltered would be prejudicial to defendants. If a person wishes to bring an entirely different claim, he should commence a separate action which may then be joined with the other actions. In this way pleadings will be delivered in respect

of his claims, and defendants will be in a better position to determine whether they need to seek discovery against him.

Paragraph 4 provides for the furnishing of particulars in respect of sheltered lien claims. The provision of particulars is often vital to enable a defendant to prepare his defence.

(5) Subject to subsection 44(4) (apportionment), a preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply.

Subsection 5 is identical to subsection 4 of the Discussion Draft. It corresponds to subsection 34(6). See the notes under that subsection.

Discussion Draft Provision:

(4) A preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply.

37.-(1) A perfected lien expires where,

(a) no appointment is made under section 62 for the trial of an action in which that lien may be realized; or

(b) an action in which that lien may be realized is not set down for trial,

within two years of the date of the commencement of the action which perfected that lien.

(2) Where a lien has expired under subsection (1), an application may be made under section 46.

Section 37

This section is derived from section 38 of the Discussion Draft and subsection 23(3) of the Mechanics' Lien Act. It provides for the automatic expiration of the lien for want of prosecution. The Committee believes that it is not unreasonable to require lien claimants to proceed expeditiously with their actions. The two year period provided under this section is a reasonable balancing of interests. It provides lien claimants with sufficient time to prepare their actions and bring them to trial. At the same time, it protects the interests of owners

Discussion Draft Provision:

38. A perfected lien expires if no appointment is made under section 62 for the trial of an action to enforce that lien or in which that lien may be enforced within two years of the date when that lien was perfected.

Mechanics' Lien Act Provision:

23.-(3) Where a certificate of action has been registered for two years or more in the land registry office and no appointment has been taken out for the trial of

Section 37.....

from stale lien claims that are registered on the title to their property. It must be remembered that the lien encumbers the title of the owner's property. Such an encumbrance may be a great burden to him.

the action, the judge or, in the Judicial District of York, the master, may, upon the application ex parte of any interested person, make an order vacating the certificate of action and discharging all liens depending thereon.

38. The expiration of a lien under this Act shall not affect any other legal or equitable right or remedy otherwise available to the person whose lien has expired.

Section 38

This provision is new to the Committee Draft. It makes it clear that the expiration of the lien does not extinguish other rights available to persons, for example, the right to bring an action for breach of contract.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
PART VI Right to Information 39.-(1) Any person having a lien or who is the beneficiary of a trust under Part II may, at any time, by written request, require the owner, or the contractor, to provide him within a reasonable time, not to exceed twenty-one days, with, (a) the names of the parties to the contract; (b) the contract price; (c) the state of accounts between the owner and the contractor; and (d) a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner.	Section 39 This section is derived from section 32 of the Mechanics' Lien Act and section 39 of the Discussion Draft. It is intended to make several significant changes to the law. It was the Committee's view that the existing right to information provisions of the Mechanics' Lien Act were seldom observed because they were unduly onerous and seriously infringed on the confidentiality of contracts in industry. The provision set out in section 39 of the Discussion Draft was more likely to be ignored than the existing provision. The philosophy underlying the new section is to require the disclosure of only that information which facilitates the enforcement of rights under this Act, and to establish time limits for compliance. The Committee's view is that a realistic provision will result in compliance. Subsection 1 specifies the information that may be demanded from an owner or contractor. A new provision is the requirement that a copy of a labour and materials payment bond be provided on demand.	Discussion Draft Provision: 39.-(1) Any person having a lien or who is the beneficiary of a trust under Part II may at any time by written request require the owner or the contractor to provide him with, (a) a copy of the contract for or in respect of which the services or materials were or are to be supplied, if the contract is in writing; (b) a statement of the terms of and parties to the contract, if the contract is not in writing; (c) the state of accounts between the owner and the contractor; (d) the name and address of the financial institution in which the joint trust account has been opened and, (i) the account number, (ii) the dates and amounts of any deposits into and disbursements from the account, and

Subsection 39(1).....

(iii) the present balance of the account.

Mechanics' Lien Act Provision:

32.-(1) Any lien claimant may in writing at any time demand of the owner or his agent the production, for inspection, of the contract or agreement with the contractor for or in respect of which the work was or is to be done or the materials were or are to be placed or furnished, if the contract or agreement is in writing or, if not in writing, the terms of the contract or agreement and the state of the accounts between the owner and the contractor, and, if the owner or his agent does not, at the time of the demand or within a reasonable time thereafter, produce the contract or agreement if in writing or, if not in writing, does not inform the person making the demand of the terms of the contract or agreement and the amount due and unpaid upon the contract or agreement or if he knowingly falsely states the terms of the contract or agreement or the amount due or unpaid thereon and if the person claiming the lien sustains loss by reason of the refusal or neglect or false statement, the owner is liable to him for the amount of

Subsection 39(1).....

the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 42(4) applies.

Section 39(2) of the Discussion Draft (deleted)

Section 39(2) of the Discussion Draft provided for the disclosure of the details of subcontracts. No similar provision is found in the Mechanics' Lien Act. The Committee is of the view that there would be little benefit in including this provision in the Construction Lien Act. In the experience of the Committee, the availability of such information would not facilitate or expedite the resolution of lien disputes. This provision would, however, undermine the confidentiality of business dealings. Therefore, the Committee recommends that this provision be deleted.

Discussion Draft Provision:

(2) Any person having a lien or who is the beneficiary of a trust under Part II, including the owner or any mortgage or unpaid vendor, may at any time by written request require the contractor or a subcontractor to provide him with,

(a) a copy of the subcontract between the contractor and the subcontractor or between one subcontractor and another subcontractor for or in respect of which the services or materials were or are to be supplied, if the subcontract is in writing;

(b) a statement of the terms of and parties to the subcontract, if the subcontract is not in writing;

(c) the state of accounts between the contractor and the subcontractor or between one subcontractor and another subcontractor.

Subsection 39(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) Any person having a lien or any beneficiary of a trust under Part II may, at any time, by written request, require a mortgagee or unpaid vendor to provide him within a reasonable time, not to exceed twenty-one days, with, (a) sufficient details of any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement; (b) a statement showing the amount advanced under the mortgage, the dates of those advances, and any arrears in payment including any arrears in the payment of interest; or (c) a statement showing the amount secured under the agreement of purchase and any arrears in payment including any arrears in the payment of interest.	Subsection 2 specifies the information that may be demanded from a mortgagee or unpaid vendor. Clause (a) is new. It requires the mortgagee to provide sufficient details of the mortgage to permit a claimant to determine whether the mortgage was taken by the mortgagee for the purposes of securing the financing of the making of the improvement. This is relevant since the Committee Draft gives lien claimants priority to the extent of any deficiencies in the required holdbacks over building mortgages, see subsection 80(2). Likewise, it also permits the obtaining of information in respect to the dates and amounts of advances, and any arrears in the payment of principal or interest on a mortgage, since this information may also be relevant in establishing the priority of lien claimants.	Discussion Draft Provision: (3) Any person having a lien or any beneficiary of a trust under Part II may at any time by written request require a mortgagee or unpaid vendor to provide him with, (a) the terms of any mortgage on the premises or of an agreement for the purchase of the premises, in respect of which the services or materials were or are to be supplied; (b) a statement showing the amount advanced under the mortgage or the amount owing under the agreement for the purchase. Mechanics' Lien Act Provision: (2) Any lien claimant may in writing at any time demand of a mortgagee or unpaid vendor or his agent the terms of any mortgage on the land or of any agreement for the purchase of the land in respect of which work was or is to be done or the materials were or are to be placed or furnished and a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be, and, if the mortgagee or vendor or his agent fails to

Subsection 39(2).....

		inform the lien claimant at the time of the demand or within a reasonable time thereafter of the terms of the mortgage or agreement and the amount advanced or owing thereon or if he knowingly falsely states the terms of the mortgage or agreement and the amount owing thereon and the lien claimant sustains loss by the refusal or neglect or misstatement, the mortgagee or vendor is liable to him for the amount of the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 42(4) applies.
(3) The trustee of a worker's trust fund may at any time by written request require any contractor or subcontractor to permit him, within a reasonable time after making the request, not to exceed twenty-one days, to inspect the payroll records of all workers who are beneficiaries of the fund, and who have supplied labour to the making of the improvement, and who are employed by the contractor or the subcontractor.	Subsection 3 gives a new right to the trustee of a worker's trust fund to require an employer to grant him access to the employer's payroll records for workers. This right will reinforce the protection of workers' fringe benefits under the Act. Trust benefits, including vacation, supplementary unemployment benefits, pensions, constitute as much as 30% of the "wages" of a construction worker. It is vitally important that these interests be protected.	
(4) Where a copy of a certificate of substantial performance has been published under subsection 32(1), the contractor shall, upon written request made to him by any person, immediately furnish in writing to the person the date of publication and the name of the construction trade newspaper in which it was published.	Subsection 4 has been inserted to provided greater access to information in respect to the certification of the substantial performance of subcontracts.	

Subsection 39(4).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(5) Where a person, who is required under subsection (1), (2), (3) or (4) to provide information or access to information, does not provide the information or access to information as required or knowingly or negligently mis-states that information, he is liable to the person who made the request for any damages sustained by reason thereof.	Subsection 5 is similar to parts of subsections 32(1) and (2) of the Mechanics' Lien Act. It provides for civil liability for the refusal, neglect to supply or misstatement of information required to be provided under this section. The Mechanics' Lien Act provided for the determination of such liability in a lien action. In the experience of the Committee no such a claim has never been brought in a lien action, nor should the Act permit it to be.	Discussion Draft Provision: (4) Where a person who under subsection 1, 2 or 3 is required to provide information does not at the time of a request, or within a reasonable time thereafter, produce and deliver such documents, statements and information or knowingly misstates the terms of any documents, statements or information, the person to whom the request was made is liable to the person making the request for damages sustained by him by reason of the refusal, neglect or misstatement in an action therefor, or in any action for the enforcement of a lien. Mechanics' Lien Act Provision: See subsections 32(1) and (2), reproduced above.
(6) Upon motion, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to him under this section and when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a solicitor-and-client basis.	Subsection 6 is substantially similar to subsection 39(5) of the Discussion Draft and is derived from subsection 28(3) of the Mechanics' Lien Act, although it differs in approach. It provides the court with the power to order a person to comply with a request that has been made of him under this section.	Discussion Draft Provision: (5) The court may at any time, whether or not an action has been commenced, order a person upon whom a request for information has been made under this section to produce the information that can be requested and any other relevant documents.

Subsection 39(6).....

Mechanics' Lien Act Provision:

(3) The judge or, in the Judicial District of York, the master, may, on a summary application at any time before or after an action is commenced for the enforcement of the claim for lien, make an order requiring the owner or his agent or the mortgage or his agent or the unpaid vendor or his agent or the contractor or his agent or the subcontractor or his agent, as the case may be, to produce and permit any lien claimant to inspect any such contract or agreement or mortgage or agreement for sale or the accounts or any other relevant document upon such terms as to costs as the judge or master considers just.

40.-(1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced.

(2) There shall be only one examination under subsection (1), but the contractor and every person named in the claim for lien who has an interest in the premises are entitled to participate therein.

Section 40

This provision, first presented in section 40 of the Discussion Draft, is strongly favoured by the Committee. However, the Committee Draft makes a few changes in detail. The purpose of the section is to provide a means of verifying claims for lien. Under the Mechanics' Lien Act no examination of a claim can take place until an action is commenced. It is widely believed that a right to cross-examine on an affidavit in support of a

Discussion Draft Provision:

40.-(1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined on the claim for lien at any time prior to discovery irrespective of whether an action has been commenced.

(2) There shall be only one examination under subsection 1, but every person named in the claim for lien is entitled to

Subsection 43(3).....

(3) Any person intending to examine a person under subsection (1) shall give at least seven days notice of the examination specifying the time and place for the exmaination to,

(a) the person to be examined or his solicitor;
(b) every other person named in the claim for lien as having an interest in the premises; and
(c) the contractor.

(4) The Supreme Court Rules of Practice pertaining to examinations apply, with necessary modifications, to cross-examinations under this section.

preserved lien will encourage the preservation of only honest claims. Furthermore, it will give the people named in the claim who have an interest in the premises, and also the contractor, an opportunity to obtain more information about the claim. The procedural restrictions on this right to cross-examine -- for example, only one examination may be made -- are to prevent abuse of this procedure.

participate therein.

(3) Any person intending to examine a person under subsection 1, shall give at least two days notice of the examination specifying the time and place for the examination to,

(a) the person to be examined, and
(b) every other person named in the claim for the lien.

(4) The Supreme Court of Ontario Rules of Practice pertaining to examinations apply, with necessary modifications, to an examination under this section.

PART VII

Discharge of Preserved or Perfected Liens

41. A preserved or perfected lien may be discharged,

(a) where the lien attaches to the premises, by the registration of a release in the prescribed form on the title to the premises and the release shall, except where the lien claimant is a corporation, be supported by an affidavit of execution; or

(b) where the lien does not attach to the premises, by giving a release in the prescribed form to the owner, in the manner set out in section 34 for the giving of copies of the claim for lien.

Section 41

Section 41 is derived from section 41 of the Discussion Draft and replaces section 29(1) of the Mechanics Lien Act. It provides for the discharge of a lien by issue of a release of claim.

Subsection 41(3) of the Discussion Draft (deleted)

The Committee recommends the deletion of this subsection. Since the form of release under section 41 is to be prescribed by regulation it is not necessary to set-out the required contents of those forms in the statute.

Discussion Draft Provision:

41.-(1) A preserved lien may be discharged by the registration of a release in the prescribed form on the premises released.

Mechanics' Lien Act Provision:

29.-(1) A claim for lien may be discharged by the registration of a receipt acknowledging payment,

(a) where made by a lien claimant that is not a corporation, signed by the lien claimant or his agent duly authorized in writing and verified by affidavit; or

(b) where made by a lien claimant that is a corporation sealed with its corporate seal.

(3) A release under subsection 1 or 2 shall,

(a) identify the premises released sufficient for registration under the Registry Act or the Land Titles Act, as the case may be,

(b) identify the owner of the premises and the lien claimant;

Section 41.....

(c) identify the claim for lien;
(d) state that the premises are released,

and shall be signed by the lien claimant, or sealed with its corporate seal in the case of a corporation, and except where the lien claimant is a corporation, shall be supported by an affidavit of execution.

Subsection 41(4) of the Discussion Draft (deleted)

The Committee is of the view that this provision deals with a number of separate concepts. For clarity, these matters have been separately dealt with in sections 44 and 47.

(4) Upon application, the court may permit the discharge of a perfected lien upon such terms as to the continuation of any action to enforce any other perfected lien as it considers appropriate in the circumstances.

42. A preserved or perfected general lien may be discharged against any one or more of the premises that are subject to it, without affecting its application to any other premises to which it applies, by the registration of a release in the prescribed form on the title of the premises released.

Section 42

Subsection 42 is similar in substance to section 41 of the Discussion Draft. It is designed to permit a lien claimant with a general lien to discharge of his lien against one or more of the premises and facilitate a sale out of which he will be paid, while still retaining his lien rights against other premises that are subject to the general lien. Discharge in these cases is also by registration of a release in the prescribed form. This provision would be primarily of use in connection with the construction of a subdivision.

Discussion Draft Provision:

(2) A preserved general lien may be discharged against one or more of the premises which are subject to it by the registration in the proper land registry office of a release in the prescribed form on the premises released.

Section 43.....

43. A preserved or perfected lien may be postponed in favour of the interest of another person in the premises by the registration on the title of the premises of a notice of postponement in the prescribed form, and in that case, subsection 80(8) applies (priorities in event of postponement).

Section 43

Section 43 is a new provision. Comments from the industry indicated a need for a procedure whereby a lien claimant could postpone his interest to that of another person, usually a mortgagee making an advance on a mortgage. Subsection 80(8) of the Committee Draft sets out the priorities resulting in the event of a postponement under this section.

44.-(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a preserved or perfected lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, of a claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $50,000 or 25 per cent of the amount described in clause (c), as security for costs.

Section 44

This section is based on subsections 29(2),(3),(4),(5) and 49(2) of the Mechanics' Lien Act and section 42 of the Discussion Draft. It provides the procedure for vacating the registration of a lien and any certificate of action with respect to that lien on payment into court of money or security for the lien. Under this procedure a lien against the premises ceases to attach to the premises, thus permitting the flow of funding to the improvement to resume. Because the amount paid into court or security posted takes the place of the premises, the flow of funds may resume without prejudice to the right of the lien claimant to realize on his claim.

Subsection 1 provides an absolute right to any person to obtain an order vacating the registration of a lien and any certificate of action dependent on that lien where the person meets the

Discussion Draft Provision:

42.-(1) Upon the application of any person for the discharge of a lien by payment into court, the court may allow the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the liens of all persons having preserved or perfected liens on the premises at the time of the application.

(3) Upon the payment into court or the posting of security with the court, the court shall order the discharge of the liens and the vacation of any certificates of action in respect of them which have been registered against the premises.

(10) An application under this section may not be made without notice to the person whose lien is to be discharged, unless the applicant undertakes to pay into

Subsection 44(1).....

conditions set out in the subsection. These conditions are that the full amount of the claim or the security for it must be paid into court, plus lesser of $50,000 or 25 per cent of the claim for costs. As the Committee Draft provides in subsection 14(2) that there is no lien for interest, this contentious problem will no longer arise on a motion to vacate registration of a lien under this section. Clause 44(1)(b) provides for the vacating of a claim for lien where the lien does not attach to the premises.

court an amount equal to the amount claimed as owing in the claim for lien, plus any additional amount which the court may require as security for costs.

Mechanics' Lien Act Provision:

29.- (2) Upon application, the judge or, in the Judicial District of York, the master, may, at any time,

(a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants together with such costs as he may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or,

(b) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or

(c) upon proper grounds, dismiss the action.

Subsection 44(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) Upon the motion of any person, the court may make an order vacating the registration of a preserved or perfected lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy that lien.	Subsection 2 provides a method to enable a person to contest the amount of a lien claim in a motion to vacate registration of a lien by payment into court or the posting of security. Contesting the amount of the claim is made a more practical procedure as a result of the new right given to cross-examine on the affidavit in support of a lien claim: see section 40. Of course, a motion under this section may only be made on notice to the lien claimant.	
(3) Where the lien does not attach to the premises, the court may make an order, upon the motion of any person, vacating a claim for lien served upon the owner, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.	Subsection 3 is the equivalent of subsection 2, and applies where the lien does not attach to the premises: see section 16.	
(4) Where a motion is made to vacate the registration of a general lien against one or more of the premises subject to that lien, the court may apportion the general lien between the premises in respect of which the application is made and all other premises that are subject to the lien.	Subsection 4 permits a court to apportion a general lien against one or more premises in respect of which an application is made, under subsections 1 or 2, for the vacating of the registration of a lien, against one of those premises. Under this provision, the lien may be apportioned between all of the premises subject to the general lien at the time of the order. Subsection 4 only deals with the apportioning and the basic motion must be made under subsection 1 or 2. This section might be of use when a person wishes to purchase one of	Discussion Draft Provision: (2) Where the application is to discharge a general lien against one or more of the premises subject to the lien, the court may apportion the general lien between each of the premises to be discharged and all of the premises subject to the lien that are not to be discharged.

the properties subject to a general lien. Subsection 4 will permit the sale to go through, but will continue to protect the rights of the lien claimant.

(5) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon notice to such persons as it may require, may order when it is appropriate to do so,

(a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; or

(b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be.

Subsection 5 allows the money paid into court, or the security posted with the court, to be reduced where it is appropriate to do so, as for example, where there has been payment to a lien claimant The Committee has redrafted this subsection (originally subsection 4 of the Discussion Draft) so as to delineate more specifically the powers of the court.

Discussion Draft Provision:

(4) The court may at any time permit the amount paid into court or the security posted to be reduced, where a fit case is made out for doing so.

Mechanics' Lien Act Provision:

29.-(6) Where money has been paid into court or a bond deposited in court pursuant to an order under subsection (2), the judge or, in the Judicial District of York, the master, may, upon such notice to the parties as he may require, order the money to be paid out to the persons entitled thereto or the delivery up of the bond for cancellation, as the case may be.

(6) Where an order is made under clause (1)(a) or subsection (2), the lien ceases to attach to the premises and becomes instead a charge upon the amount paid into court or security posted.

Subsections 6 and 7 deal with related issues. Subsection 6 provides that where an order to vacate the registration of a lien is made under subsections 1 or 2, the lien ceases to attach to the premises. Under subsection 7 where the lien never attached to the premises as a result of section 16, the lien cease to be a charge on the holdback. The Committee is of the view that the person claiming the lien the registration of which is vacated

Discussion Draft Provision:

(5) Subject to subsection 8, where an order is made under subsection 3, the liens cease to exist as an interest in the premises and are a first charge on the payment into court or the security posted which takes the place of the premises and are subject to the claims of every person whose lien was discharged by the order to

Subsection 44(7).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(7) Where an order is made under clause (1)(b) or subsection (3), the lien ceases to attach to the holdbacks and other amounts subject to a charge under section 21 and becomes instead a charge upon the amount paid into court or security posted.	should not have a first charge on the money or security in court as provided in subsection 29(4) of the Mechanics' Lien Act, but should simply have a charge on the money or security. The term "first charge" in that provision has created confusion. The intention of the Committee, as set out in subsection 9, is that all lien claimants should share rateably in the money or security paid into court and in the proceeds of the sale of the premises. The giving of a first charge to claimants whose lien registration has been vacated would result in their having an improper priority.	the same extent as if the payment into court or security posted with the court was realized by the sale of the premises in an action to enforce the liens. Mechanics' Lien Act Provision: (3) Notwithstanding sections 24 and 26, where an order to vacate the registration of a lien is made under clause (2)(a) or (b), the lien does not cease to exist for the reason that no certificate of action is registered. (4) Any money so paid into court, or any bond or other security for securing the like amount and satisfactory to the judge or officer, takes the place of the property discharged and is subject to the claims of every person who has at the time of the application a subsisting claim for lien or given notice of the claim under subsection 12(7) or section 15 to the same extent as if the money, bond or other security was realized by a sale of the property in an action to enforce the lien, but such amount as the judge or officer finds to be owing to the person whose lien has been so vacated is a first charge upon the money, bond or other security.

Subsection 44(8).....

(8) Where more than one motion is made under subsection (1), (2) or (3) for the payment into court or posting of security to obtain an order vacating the registration of one or more preserved or perfected liens arising from the same improvement, the court may consolidate the motions and require that the amount paid into court or security posted be adequate to satisfy all the liens that are the subject of each of the motions, or make any other order that it considers appropriate.

Subsection 8 is derived from subsection 42(7) of the Discussion Draft. This section provides for the consolidation of several motions to obtain the vacating of the registration of one or more liens. This provision may be useful in a number of situations. For example, where two or more lien claims are inter-related (as where a subcontractor and his supplier both make a claim for lien), it may be advantageous to consolidate any order under this section in respect to both those liens, since any amount paid into court to stand as security for one lien will also stand as security for the other.

(7) Where more than one application is made under subsection 1 for the payment into court or posting of security to permit the discharge of liens with respect to the same improvement, the court may consolidate the applications and require that the payment into court or the security posted be adequate to satisfy all the liens which have been the subject of applications or make such other order as it considers just.

(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures set out in Part VIII, but no certificate of action shall be registered against the premises.

Subsection 9 provides a clear set of rules for the distribution of the money or security paid into court to obtain an order vacating the registration of a lien and the proceeds of a sale of the premises. It makes it clear that all lien claimants share ratably according to the priorities provided for in section 82.

Discussion Draft Provision:

42.-(6) The persons whose liens were discharged by the order under subsection 3 may proceed with an action to enforce a claim against the money paid into court or the security posted with the court in accordance with the procedures set out in Part VIII, but no certificate of action shall be registered against the premises.

(8) Where a person whose lien was discharged under this section proceeds under subsection 6 to enforce a claim against the money paid into court or security posted, and judgment is given in his favour, the following rules apply:

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT Subsection 44(9).....
2. The amount paid into court or security posted is subject to the claims of all persons having a lien to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien. 3. Where any amount is realized in a lien action by the sale of the premises or otherwise, it shall be pooled into a common fund with the amount paid into court or security posted under this section, and shall be distributed among all lien claimants in accordance with the priorities provided for in section 82.		1. Where the lien was discharged upon the posting of security, and the security is realized, any money recovered as a result of the realization of the security shall be paid into court. 2. Where the lien was discharged upon the posting of security, and the judgment may be satisfied without realizing the security, an amount sufficient to satisfy the judgment shall be paid into court. 3. No funds may be paid out of court except upon order of the court, which order may not be given, (a) until the expiration of the period of thirty days next following the day on which judgment was entered; and (b) unless the court is satisfied that there are no preserved or perfected liens existing against the premises.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		4. Where no payment may be made out of court under paragraph 3 because there are preserved or perfected liens against the premises, the funds in court, (a) shall be retained until the disposition of any proceedings to enforce those liens, or those liens have been discharged; and (b) shall be applied in satisfaction of all liens, including those discharged under this section. 5. Where funds have been retained under paragraph 4, and the premises have been sold under Part VIII or IX in order to satisfy a lien, the proceeds of the sale shall be applied in satisfaction of all liens, including those discharged under this section.
45.-(1) Where a lien that attaches to the premises is not perfected within the time allowed for doing so under section 36, the court upon, (a) the motion of any person without notice to any other person;	Section 45 This provision replaces section 43 of the Discussion Draft and subsection 29(5) of the Mechanics' Lien Act. It permits a motion for a declaration that a lien has expired where that lien has not been perfected within the time allowed	Discussion Draft Provision: 43. Where a lien preserved by registration has not been perfected within the time allowed for doing so, the court, upon the application of any person without notice to any other person, shall order

Subsection 45(1).....

(b) proof that the lien has not been perfected; and

(c) production of,

(i) a certificate of search under the Land Titles Act, or

(ii) a registrar's abstract under the Registry Act,

together with a certified copy of the claim for lien,

shall declare that the lien has expired and order that the registration of the claim for lien be vacated.

(2) Where the court is satisfied that a preserved lien that does not attach to the premises has not been perfected within the time allowed for doing so under section 36, the court upon the motion of any person without notice to any other person shall declare that the lien has expired.

(3) Where a declaration is made under subsection (1) or (2), the court shall order that,

(a) any amount that has been paid into court under section 44 in respect of that lien be returned to the person who paid the amount into court; and

(b) any security that has been posted under section 44 in respect of that lien be cancelled.

for so doing. This motion may be made without notice to the person claiming the lien, since in practice it is often very difficult and expensive to effect such notice, and there is little benefit to be derived from requiring notice to be given. The section expressly requires the production of irrebutable evidence of the expiration of the lien before any declaration may be made. The giving of such a declaration is mandatory where this evidence is introduced. Where a declaration of expiration is made, the court is required to order that the claim for lien be vacated. Subsection 3 provides for the return of any amount paid into court or the cancellation of any security posted with the court in respect of that lien.

The corresponding provision of the Discussion Draft provided for an order of discharge of the lien. In the opinion of the Committee, this was an inappropriate use of terminology. Where a lien has expired, it cannot be discharged, since it has ceased to exist. A declaration of expiration is more appropriate.

the vacation of the claim for lien registered against the premises, upon production of,

(a) a certificate of search under The Land Titles Act; or

(b) a registrar's abstract under The Registry Act,

together with a certified copy of the preserved claim for lien.

Mechanics' Lien Act Provision:

(5) Where the certificate required by section 24 or 26 has not been registered within the prescribed time and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate, the order vacating the lien may be made ex parte upon production of a certificate of search under the Land Titles Act or of a registrar's abstract under the Registry Act, as the case may be, together with a certified copy of the registered claim for lien.

Section 46.....

46.-(1) Where a perfected lien that attaches to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired, and shall make an order dismissing the action to enforce that lien and vacating the certificate of action in respect of that action.

(2) Where a perfected lien that does not attach to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to realize upon that lien.

(3) A motion under subsection (1) or (2) may be brought without notice, but no order as to costs in the action may be made upon the motion unless notice of that motion was given to the person against whom the order for costs is sought.

(4) Where an action is dismissed under subsection (1) or (2), the court shall order that,

(a) any amount that has been paid into court under section 44 in respect of that action be returned to the person who paid the amount into court; and

(b) any security that has been posted under section 44 in respect of that action be cancelled.

Section 46

Section 46 is derived from section 44 of the Discussion Draft and subsection 24(3) of the Mechanics' Lien Act. Under section 37, a lien expires for want of prosecution where no appointment is made for the trial of an action under section 62, or the action is not set down for trial, within two years of the date of the commencement of the action to enforce that lien. Note that because of the possibility of sheltering, a single action may often relate to several liens. Where these liens have expired under section 37, section 46 requires the court to declare their expiration and to make an order dismissing the action and vacating the registration of the certificate of action in respect of that action. Subsection 4 provides for the return of any deposit or security posted with the court under section 44 in respect of that action.

Mechanics' Lien Act Provision:

24.-(3) Where a certificate of action has been registered for two years or more in the land registry office and no appointment has been taken out for the trial of the action, the judge or, in the Judicial District of York, the master, may, upon the application ex parte of any interested person, make an order vacating the certificate of action and discharging all liens depending thereon.

Discussion Draft Provision

44. Where a certificate of action has been registered against the premises for two years or more, and no appointment has been obtained for the trial of the action, the court, upon the application of any person, without notice to any other person, shall make an order vacating the certificate of action and discharging all liens depending thereon.

Subsection 46(4).....

Subsection 42(9) of the Discussion Draft (deleted)

The Committee is of the opinion that this provision should be deleted as unnecessary. Subsection 42(9) related to the Joint Trust Account provisions of the Discussion Draft, which the Committee also recommends be deleted.

(9) No part of the holdback may be paid into court in order to obtain the discharge of a lien under this section until the expiration of the time for the preservation of all liens which may be claimed against the part of the holdback to be paid into court.

Subsection 42(11) of the Discussion Draft (deleted)

The Committee is also of the opinion that this provision may be deleted as unnecessary. Subsection 44(5) provides for the reduction of any amount paid into court or security posted with the court in appropriate cases, and for the return of any part of that amount to the person entitled to it.

(11) Where it is found that the lien claimant is entitled to less than the amount which has been paid into court under this section in order to obtain the discharge of his lien, the balance of that amount shall be returned to the person who paid the money into court.

47.-(1) Upon motion, the court may,

(a) order the discharge of a lien;

(b) order that the registration of,

(i) a claim for lien, or

(ii) a certificate of action,

or both, be vacated;

(c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or

(d) dismiss an action,

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

(2) Where a certificate of action is vacated under subsection (1), and there remain

Section 47

This section is derived from section 45 and subsection 41(4) of the Discussion Draft and replaces clause 29(2)(b) of the Mechanics' Lien Act. It empowers the court to dismiss an action, discharge a lien or vacate the registration of a claim for lien or certificate of action upon proper grounds. Clause 47(1)(c) will be of particular use when a person gives written notice of a lien, and then apparently abandons his claim. This section is intended to provide the court with sufficient flexibility to enable it to meet the numerous unique circumstances which may arise in the trial of a mechanics' lien action.

Discussion Draft Provision:

45. The court may order the discharge of a lien or the vacation of a certificate of action that has been registered against a premises upon any proper ground and subject to any terms and conditions that it considers appropriate in the circumstances.

(4) Upon application, the court may permit the discharge of a perfected lien upon such terms as to the continuation of any action to enforce any other perfected

Subsection 47(2).....

liens which may be enforced in the action to which that certificate relates, the court shall give any directions that are necessary in the circumstances in respect of the continuation of that action.

Subsection 2 requires the giving of directions as to the continuation of any action where an order is made vacating the certificate of action in respect of that action.

lien as it considers appropriate in the circumstances.

Mechanics' Lien Act Provision:

(2) Upon application, the judge or, in the Judicial District of York, the master, may, at any time,

(a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants together with such costs as he may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the cerficate of action, if any, be vacated;

(b) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or

(c) upon proper grounds, dismiss the action.

Section 48.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
48. A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of the person whose lien was discharged to claim a lien in respect of services or materials supplied by him subsequent to the registration of the claim for lien relating to the discharged lien.	Section 48 This section is derived from subsection 46(1) of the Discussion Draft. The primary purpose of the provision is to make it clear that where a lien has been discharged, as for example by the registration of a release under section 41, the person whose lien was discharged has the right to claim another lien for services or materials supplied by him to the improvement subsequent to the registration of the claim that was discharged. As noted earlier, the Committee Draft, like the Discussion Draft, contemplates that an individual may claim more than one lien with respect to an improvement, provided that each lien claim is with respect to different services or materials that have been supplied. This is not possible under the Mechanics' Lien Act. As a result, under the new Act, claims for lien should more accurately reflect the unpaid price of services or materials that have been supplied to the time of the claim.	Discussion Draft Provision: 46.-(1) A discharge of a lien under this Part is irrevocable and the discharged lien cannot be revived as an interest in the premises.
49. Where the lien attaches to the premises, an order declaring that a lien has expired, or discharging a lien, or vacating the registration of a claim for lien or a certificate of action, may be registered by registering on the title of the premises a certified copy of the order, and the order shall include a description of the premises	Section 49 This section is derived from subsection 29(7) of the Mechanics' Lien Act and subsections 46(2) and (3) of the Discussion Draft. This section provides for the registration of orders and sets out the requirements for registration.	Discussion Draft Provision: (2) An order discharging a claim for lien or vacating a certificate of action may be registered by registering in the proper land registry office a copy of the order certified under the seal of the court.

Section 49.....

sufficient for registration under the Registry Act or the Land Titles Act, as the case may be, and a reference to the registration number of every preserved or perfected claim for lien and certificate of action thereby affected.

(3) An order discharging a claim for lien shall include a description of the land sufficient for registration under The Land Titles Act or The Registry Act, as the case may be, and a reference to the registration number of every affected preserved or perfected lien and certificate of action.

Mechanics' Lien Act Provision:

(7) An order discharging a claim for lien or vacating a certificate of action shall be registered by registering the order or a certificate thereof, under the seal of the court, that includes a description of the land as required by the Land Titles Act or the Registry Act and the regulations thereunder, as the case may be, and a reference to the registration number of every registered claim for lien and certificate of action affected thereby.

PART VIII

Jurisdiction and Procedure

50.-(1) A lien claim is enforceable in an action in the Supreme Court in accordance with the procedure set out in this Part.

(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

(3) Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.

Section 50

This section replaces section 34 and subsection 33(1) of the Mechanics' Lien Act. The Discussion Draft provided that trust claims arising out of Part II of the Act could be joined with a lien action. This would have been possible under sections 56 and 57 of the Discussion Draft. The text of those sections may be found on pages 139-140 of this Report. The principle underlying those sections was that, all claims relating to an improvement should be dealt with at one time where it is practical to do so.

After extensive discussions, the Committee determined that a trust claim should not be joined with a lien claim. While the principle of joining these different claims is attractive in theory, in practice the joining of these different types of claims likely would result in hardship for many lien claimants. The issues as well as the parties would often be very different in a claim for lien as opposed to a trust claim. The avoidances of undue delay in the resolution of lien claims should be the primary purpose of the Act. Therefore, subsection 50(2) of the Committee Draft now provides expressly that a trust claim may not be joined with a lien claim.

Discussion Draft Provision:

47.-(1) A lien claim is enforceable in an action in the Supreme Court in accordance with the procedure set out in this Part.

(2) Any trust or other claim not joined with a lien claim or a trust or other claim severed from a lien claim is enforceable in a court of competent jurisdiction.

Mechanics' Lien Act Provision:

33.-(1) A claim for lien is enforceable in an action in the Supreme Court.

34. Any number of lien claimants claiming liens on the same land may join in an action, and an action brought by a lien claimant shall be deemed to be brought on behalf of himself and all other lien claimants.

Section 49 of the Discussion Draft.

51.-(1) Where the premises or a part thereof are situte in the Judicial District of York, an action shall be tried by a judge of the court.

(2) Where the premises are situate outside the Judicial District of York, an action shall be tried,

(a) by a local judge of the court having jurisdiction in the county or district in which the premises or a part thereof are situate; or

(b) where upon motion the local judge so orders, by a judge of the court at the regular sittings of the court for the trial of actions in the county or district in which the premises or a part thereof are situate.

(3) Where the premises or a part thereof are situate in more than one county or district, an action may be tried by any judge or local judge who has jurisdiction under subsection (1) or (2) in any of the counties or districts in which the premises are situate.

Section 49 of the Discussion Draft (deleted)

The Committee proposes that this section be deleted. It is no longer required, since trust claims may no longer be joined with a lien action.

Section 51

This section replaces section 48 of the Discussion Draft and subsections 35(1) and (2) of the Mechanics' Lien Act. One change from the existing Mechanics' Lien Act is that the decision of whether a Supreme Court judge should try the action shall now be made by the local judge. The Committee notes that the trial of these actions by a Supreme Court judge is rare. However, the Committee is of the opinion that it may occasionally be beneficial to the parties to have the trial of the action conducted by a Supreme Court judge. However, primary jurisdiction over the trial of those actions continues to be vested in the local judges of the Court. Local judges have exercised this jurisdiction for many years.

The Committee proposes that jurisdiction over the trial of construction lien actions in respect to premises situate in the Judicial District of York continue to be vested exclusively in the judges of the High Court. Local judges should not exercise jurisdiction in those cases. The heavy caseload of the County Court of the Judicial District of York makes

Discussion Draft Provision:

49. A local judge of the court may exercise the jurisdiction of the Supreme Court under The Trustee Act in dealing with a trust arising under this Act.

Discussion Draft Provision:

48.-(1) Where the premises or a part thereof are situate in the Judicial District of York, an action shall be tried by a judge of the court.

(2) Outside the Judicial District of York, an action shall be tried by the local judge of the court in the county or district in which the premises or part thereof are situate and the local judge has all the jurisdiction, powers and authority of the court in respect of all matters under this Act.

(3) Where the premises are situate in more than one county or district, an action may be tried by any judge or local judge who has jurisdiction under subsection 1 or 2 in any of the counties or districts in which the premises are situate.

Mechanics' Lien Act Provision:

35.-(1) Except in the Judicial District of York, the action shall be tried by the local judge of the Supreme Court in

Subsection 51(3).....

it undesireable to confer further jurisdiction on that court. In addition, almost all construction lien actions in the Judicial District of York are referred to the master for trial. Section 60 deals with the reference of the trial to a master or appointed local master.

the county or district in which the action was commenced, but, upon the application of any party or other interested person made according to the practice of the Supreme Court and upon notice, the court may direct that the action be tried by a judge of the Supreme Court at the regular sittings of the court for the trial of actions in the county or district in which the action was commenced.

(2) In the Judicial District of York, the action shall be tried by a judge of the Supreme Court, but,

(a) on motion after defence or defence to counter-claim, if any, has been delivered or the time for such delivery has expired, a judge of the Supreme Court may refer the whole action to the master for trial pursuant to section 71 of the Judicature Act; or

(b) at the trial, a judge of the Supreme Court may direct a reference to the master pursuant to section 70 or 71 of the Judicature Act.

Section 52.....

52.-(1) Except as provided in subsection (2),

(a) the master, where the premises or a part thereof are situate in the Judicial District of York;

(b) a local master appointed for the county or district in which the premises or a part thereof are situate, where the premises are situate outside the Judicial District of York,

(c) a local judge, where the local judge has ordered that the action be tried by a judge of the court under clause 51(2)(b),

has jurisdiction to hear and dispose of any motion under this Act, including a motion brought prior to the commencement of an action, and all motions relating to the conduct of an action or reference under this Act.

(2) A master or appointed local master shall not hear or dispose of a motion,

(a) for the trial of the action by a judge under clause 51(2)(b);

(b) for the reference of an action to a master or appointed local master for trial;

(c) that is an originating application; or

(d) in respect of an appeal.

(3) In addition to his jurisdiction under subsection (1), a master or appointed local master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of

Section 52

Section 52 is derived from section 50 of the Discussion Draft. It delineates the jurisdiction of masters and appointed local masters of the Supreme Court. An "appointed local master" is one who has been specifically appointed as such under subsection 101(1) of the Judicature Act, and should be distinguished from a county court judge who may act as a local master under subsection 101(2) of that Act.

Subsection 1 is designed to eliminate an inappropriate jurisdiction given to the master. By virtue of the Judicature Act and the Rules of Practice the master at Toronto has heard motions on mechanics' lien actions arising in all parts of the Province. The Committee believes that the motions in respect to the conduct of an action should be heard at the place of the trial of that action.

Subsection 2 deals with those matters that, for constitutional reasons, cannot be given to a master to determine.

Subsection 3 clarifies the jurisdiction of the master where a reference is ordered under section 60. Where a master is hearing a reference, he enjoys all the powers of the court under section 53.

Discussion Draft Provision:

50.-(1) Except as provided in subsection 2,

(a) a master, where the premises or part thereof are situate in the Judicial District of York; and

(b) a local master, where the premises or a part thereof are situate outside the Judicial District of York,

has jurisdiction to hear and dispose of any application under this Act, including applications where no action has been commenced, and all applications related to the conduct of an action or reference under this Act.

(2) A master or local master shall not hear or dispose of an application,

(a) for the reference of an action to a master or local master for trial, or

(b) in the nature of or in respect to an appeal.

(3) In addition to his jurisdiction under subsection 1 and under The Judicature Act, a master or local master to whom a reference has been directed has all the jurisdiction, powers and authority of the

Subsection 52(3).....

the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

53. The court, whether the action is being tried by a judge or local judge, or by a master or an appointed local master on a reference,

(a) shall try the action, including any set-off, cross-claim, counterclaim, and, subject to section 58, third party claim, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it or upon whom notice of trial has been served; and

(b) shall take all accounts, make all enquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action.

Section 53

This section replaces section 51 of the Discussion Draft and clauses 42(4)(a) and (b) of the Mechanics' Lien Act. The Committee is of the opinion that section 51 of the Discussion Draft was imprecise, and suggests that the substance of this provision as restated in section 53 more clearly defines the powers and duties of the court in trying a lien action.

court to try and completely dispose of the action and all matters and questions arising in connection with the action including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

Discussion Draft Provision:

51. The court trying an action shall take all steps as are necessary to enable it to dispose of the action and all matters related to it, completely and may adjust the rights and liabilities of and give all necessary relief to all parties to the action.

Mechanics' Lien Act Provision:

(4) The judge, or where a reference for trial is directed, the master,

(a) shall try the action, including any set-off and counterclaim, and all questions that arise therein or that are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom notice of trial has been served;

Section 53.....

(b) shall take all accounts, make all inquiries, give all directions and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial.

Section 53 of the Discussion Draft (deleted)

This section has been deleted by the Committee as it is no longer necessary. The Act now makes exhaustive provision as to how any powers conferred by it upon the court are to be exercised.

53. Except where otherwise provided in this Act, any power conferred on the court may be exercised by the court upon the application of any person.

Section 54 of the Discussion Draft (deleted)

The Committee proposes that this section be deleted. Both it and its antecedent in the Mechanics' Lien Act, section 42(10), are highly ambiguous. Interlocutory motions in respect to discovery, pleadings and production are governed by section 69(2) of the Act.

Discussion Draft Provision:

54. Any person may apply to the court for directions as to pleadings, discovery, production or any other matter relating to an application, action or reference.

Section 54 of the Discussion Draft.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		Mechanics' Lien Act Provision: (10) Any party to an action under this Act or any other interested person may at any time and from time to time apply to the judge having jurisdiction to try the action or, in the Judicial District of York, the master, for directions as to pleadings, discovery, production or any other matter relating to the action or reference, including the cross-examination of a lien claimant or his agent or assignee on his affidavit verifying the claim.
54. A judge, local judge, master or an appointed local master does not acquire exclusive jurisdiction over the trial of an action or reference by reason only of his appointing the time and place for the trial of the action or reference, or for the holding of a settlement meeting.	Section 54 This section is derived from subsection 42(9) of the Mechanics' Lien Act and section 52 of the Discussion Draft. It ensures that a judicial officer does not become seized of the action merely by appointing the time and place for the trial of the action or the holding of a settlement meeting.	Discussion Draft Provision: 52. A judge, local judge, master or local master of the court does not become seized of an action or reference by reason only of his appointing the time and place for the trial or reference. Mechanics' Lien Act Provision: (9) An action or reference under this Act may be tried by any judge or officer having jurisdiction to try the action or reference notwithstanding that the time and place for the trial or reference thereof were appointed and fixed by another judge or officer.

Section 55.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
55.-(1) An action shall be commenced by filing a statement of claim in the office of the registrar or local registrar of the court in the county or district in which the premises or a part thereof are situate. (2) The statement of claim shall be served within ninety days after it is filed, but the court may, upon a motion made before or after the expiration of that period of time, extend the time for service. (3) A cross-claim or counterclaim by any person shall accompany his statement of defence, but on motion the court may grant leave to deliver a cross-claim or counterclaim after this time where it is appropriate to do so, and where leave is granted, the court may, (a) make any order as to costs that it considers appropriate; and (b) give directions as to the conduct of the action.	Section 55 Subsection 1 is substantially the same as subsection 33(2) of the Mechanics' Lien Act. A writ of summons is not required in a lien action. An action is commenced by filing a statement of claim. Subsection 2 is based on subsection 33(3) of the Mechanics' Lien Act and subsection 55(2) of the Discussion Draft. It was the opinion of the Committee that there should be 90 days instead of the present 30 days for the service of the statement of claim. In many cases, it is nearly impossible to effect service of the statement of claim within 30 days on all the defendants to that claim. The Committee also decided that the 12 months provided for service of a writ of summons under the Judicature Act, and indeed any period longer than 90 days, for service of the statement of claim would unduly protract the period from bringing these actions on. Section 89 of the Committee Draft provides that service of the statement of claim shall ordinarily be by personal service but provides the court with a power to order substitutional service. The time allowed for the delivery of the statement of defence is provided in subsection 56(1). Subsection 3 generally requires that a counterclaim or cross-claim be delivered together with the statement of defence. In some cases, this will not be possible, so the court is given the power to grant leave to deliver a late counterclaim or cross-claim. A counterclaim is a claim by a defendant against the person who named him as a defendant.	Discussion Draft Provision: 55.-(1) An action shall be commenced by filing a statement of claim in the appropriate office of the court. (2) The statement of claim shall be served within thirty days after it is filed but the court may, on application made before or after the expiration of that period of time, extend the time for service. (3) A cross-claim or counterclaim by any person shall be set out in his statement of defence. (4) Except as otherwise prescribed in this Act the pleadings in an action shall be as provided for in The Judicature Act, and the rules of practice and procedure thereunder. Mechanics' Lien Act Provision: (2) An action under this section shall be commenced by filing a statement of claim in the office of the local registrar of the Supreme Court in the county or district in which the land or part thereof is situate. (3) The statement of claim shall be served within thirty days after it is filed, but the judge having jurisdiction to try the action or, in the Judicial District of York, the master, may extend the time for service.

Section 55.....

A cross-claim is a claim by one defendant against another defendant.

56.-(1) The time for delivering a statement of defence to a lien claim, cross-claim, counterclaim or third party claim shall be the same as for entering an appearance under the Supreme Court Rules of Practice.

(2) Where a person named as a defendant in a statement of claim, counterclaim, cross-claim or third party claim defaults in the delivery of a statement of defence in respect of that claim, pleadings may be noted closed against him in respect of that claim.

(3) Where pleadings have been noted closed against a defendant under subsection (2), he shall not be permitted to contest the claim of the person who named him as a defendant, or to file a statement of defence, except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence, and where leave is granted, the court,

(a) may make any order as to costs that it considers appropriate; and

(b) may give directions as to the conduct of the action.

Section 56

This is a new provision. The Committee wishes to voice its disapproval of what it considers to be a most improper practice namely, prolonged delay by defendants in the service of statements of defence in mechanics' lien actions. Such delays often result in prejudice to other parties and complicate the settlement process. The Committee believe that this widespread practice is to be condemned, and that steps should be taken to ensure that it does not continue in the future. Section 56 is intended to promote the timely service of statements of defence. Where a defendant defaults in the delivery of his statement of defence, pleadings may be noted closed against him. Where pleadings are noted closed against a defendant in respect of any claim, cross-claim, counterclaim, or third party claim, he will not be permitted to contest that claim without leave of the court. Before giving that leave the court must be satisfied that there is evidence to support his defence. In addition, he may be penalized for costs.

(4) The time for delivering the statement of defence in the action shall be the same as for entering an appearance in an action in the Supreme Court.

Mechanics' Lien Act Provision:

33.-(4) The time for delivering the statement of defence in the action shall be the same as for entering an appearance in an action in the Supreme Court.

Subsection 56(4).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(4) Except where leave has been granted under subsection (3), a defendant against whom pleadings have been noted closed under subsection (1) shall be deemed to admit all allegations of fact made in the statement of claim, counterclaim, cross-claim or third party claim, as the case may be, and shall not be entitled to notice of or to participate in the trial of the action or any proceeding in respect of the action and judgment may be given against him.	As under the present legislation, the time for delivering a statement is the same as for entering an appearance in an ordinary action in the Supreme Court.	
(5) Every statement of claim, cross-claim, counterclaim or third party claim shall include the following warning to defendants: "WARNING: If you wish to defend against this claim, you are required to deliver a statement of defence within the time allowed under the Supreme Court Rules of Practice for entering an appearance. Should you fail to deliver a statement of defence as required, pleadings may be noted closed against you, and you shall be deemed to admit all allegations of fact contained in this claim, and you shall not be entitled to notice of or to participate in the trial or any proceeding in respect of this claim and judgment may be given against you."		

Subsection 58(1).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
57.-(1) A plaintiff in an action may join with his lien claim a claim for breach of his contract or subcontract.	Section 57 Section 57 replaces section 56 of the Discussion Draft. Its purpose is to set out the type of claims which may be tried in an action under this Act. As noted under section 50(2), the Committee is of the view that trust claims should not be permitted in a lien action. Subsection 1 permits a plaintiff-lien claimant to join with his claim for lien a claim for breach of his contract or subcontract. The plaintiff will be able to get personal judgement for proven contractual claims beyond the scope of his lien claim. He may also claim interest on the contract as part of his personal claim. The present law is unclear as to the types of causes of action which may be joined with a lien claim.	Discussion Draft Provision: 56.-(1) Any claims arising from or related to an improvement may be joined with an action to enforce a lien, (a) by a lien claimant, in his statement of claim; or (b) by a defendant, (i) in a counterclaim against the person who named him as a defendant, or (ii) in a cross-claim against a co-defendant. (2) A defendant named in a statement of claim, counterclaim or cross-claim may name any other person, even if that other person is not a party to the action, as a co-defendant by setting out the name of that person together with the claim against that person in his statement of defence, and by serving a copy of the statement of defence together with a copy of the statement of claim upon that person. (3) A defendant may raise any legal or equitable defence available to him.
(2) A defendant in an action may, (a) counterclaim against the person who named him as a defendant in respect of any claim that he may be entitled to make against that person, whether or not that claim is related to the making of the improvement; (b) cross-claim against a co-defendant in respect of any claim that he may be entitled to make against that person related to the making of the improvement.	Clause 57(2)(a) allows a defendant to counterclaim against the person who named him as a defendant. Clause 57(2)(a) allows a counterclaim in respect of any matter or cause, whether or not related to the improvement. The clause manifests and embodies in a procedural context the principles laid down in section 12 and subsection 17(2): the limit on the obligation of a trustee under Part II, and upon the amount of a lien. Clause 57(2)(b) permits a defendant to cross-claim against a co-defendant. A cross-claim is limited to claims that are related to the	

Subsection 57(2).....

58. The following rules govern third party proceedings:

1. Subject to paragraph 2, a defendant named in a statement of claim, cross-claim, counterclaim or third party claim may join a person who is not a party to the action as a third party for the purpose of claiming contribution or indemnity from the third party in respect of that claim.

2. A person may only be joined as a third party with leave of the court upon a motion made with notice to the owner and all persons having subsisting preserved or perfected liens at the time of the motion, but such leave shall not be given unless the court is satisfied that the trial of the third party claim will not,

improvement. Unlike the counterclaim which must be determined in order to establish the value of a lien, a cross-claim that is unrelated to the improvement would be irrelevant to the other parties to a lien action, and therefore should not be determined in the context of that action.

Section 58

Section 58 is new. Under the Mechanics' Lien Act, third party proceedings are not permitted.

Under subsection 56(2) of the Discussion Draft, third party proceeding would have been permitted without leave of the court. The Committee is of the view that the resolution of lien claims should be the primary purpose of the procedures under a new Act. However, there are circumstances where third party proceedings to recover contribution or indemnity are intimately related to the evidence in the lien action, and where the conduct of the third party proceedings will not unduly prejudice the third party or unduly delay or complicate the resolution of the lien action. In these cases a defendant and a third party should not have to go to the expense of a separate action. Section 58 empowers the court to permit the bringing of third party proceedings in such cases. Where the court gives its consent, it has the authority to make appropriate

Discussion Draft Provision:

56.-(1) Any claims arising from or related to an improvement may be joined with an action to enforce a lien,

(a) by a lien claimant, in his statement of claim; or

(b) by a defendant,

(i) in a counterclaim against the person who named him as a defendant, or

(ii) in a cross-claim against a co-defendant.

(2) A defendant named in a statement of claim, counterclaim or cross-claim may name any other person, even if that other person is not a party to the action, as a co-defendant by setting out the name of that person together with the claim against that person in his statement of defence, and by serving a copy of the statement of defence together with a copy of the statement of

Section 58.....

(i) unduly prejudice the ability of the third party or of any lien claimant or other defendant to prosecute his claim or conduct his defence, or
(ii) unduly delay or complicate the resolution of the lien action.

3. The court may give such directions as it considers appropriate in the circumstances in respect of the conduct of third party proceedings.

arrangements for the conduct of the third party proceedings.

claim upon that person.

(3) A defendant may raise any legal or equitable defence available to him.

Section 57 of the Discussion Draft (deleted)

The Committee recommends the deletion of this section as it is unnecessary. Third party claims may only be brought with leave of the court. The merits of joining the third party claim with the lien action would be considered by the court in deciding whether to grant leave. Only those cross-claims that are relevant to the lien action may be joined with the lien action. As noted in the notes under section 57, all counterclaims will be relevant in determining liability. Trust claims may not be joined with the lien action.

Discussion Draft Provision:

57.-(1) The court may order the severance of any trust claim, personal claim, counterclaim or cross-claim from an action where it is satisfied that the joinder of such claims with the action would,

(a) cause undue prejudice to the other parties to the action or to the defendant named in the claim; or
(b) unduly complicate or prolong the conduct of the action.

(2) Where a trust claim under Part II that was joined with a lien claim was brought within the limitation period provided by section 14, any new action to enforce the trust claim is deeemed to be brought within the limitation period provided by that section if it is brought within sixty days of the severance of that action under subsection 1.

Section 59.....

59.-(1) The person serving the notice of trial and all persons served with notice of trial are parties to the action.

(2) Subject to section 56, the court may at any time add or join any person as a party to the action.

Section 59

Section 59 identifies the parties to an action. It replaces sections 58 of the Discussion Draft and subsection 33(5) of the Mechanics' Lien Act. Subsection 58(2) has been deleted as unnecessary, in consequence to the changes which the Committee has recommended in respect to the sheltering provisions of the Act. Note that no notice of trial need be served on a defendant who has defaulted in delivering a statement of defence, see subsection 56(4).

Discussion Draft Provision:

58.-(1) The person serving the notice of trial and all persons served with notice of trial are parties to the action.

(2) Any person with a perfected lien may join as a party to an action commenced prior to the perfection of his lien unless a date for trial of the action has been taken out for that action by filing with the court notice of his intention to join and by serving a copy of the notice on the owner, the person who commenced the action, and if some other person has carriage of the action, that other person.

(3) The court may at any time add or join any person as a party to the action.

Mechanics' Lien Act Provision:

(5) It is not necessary to make any lien claimants parties defendant to the action, but all lien claimants served with the notice of trial shall for all purposes be deemed to be parties to the action.

60.-(1) On motion made after the delivery of all statements of defence, or the statements of defence to all cross-claims, counterclaims, or third party claims, if any, or the time for their delivery has expired,

(a) a judge may refer to a master; or
(b) a local judge may refer to a local master appointed for the county or district in which the premises or part thereof are situate,

the whole action for trial under section 71 of the Judicature Act.

Section 60

Section 60 is substantially the same as section 59 of the Discussion Draft and section 35(2) and (3) of the Mechanics' Lien Act. It provides for the reference of construction lien proceedings to masters and appointed local masters, in accordance with the Judicature Act. For more

Discussion Draft Provision:

59.-(1) On application after defence or defence to a cross-claim or counterclaim, if any, has been delivered, or the time for such delivery has expired, a judge may refer to the master and a local judge to the local master, the whole action for trial under

Subsection 60(2).....

(2) At the trial,

(a) a judge may direct a reference to a master; or

(b) a local judge may direct a reference to a local master appointed for the county or district in which the premises or part thereof are situate,

under section 70 or 71 of the Judicature Act.

(3) Where under subsection (1), the action has been referred to the master or local master for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action, make a motion to a judge or the local judge of the court who directed the reference to set aside the judgment directing the reference.

(4) Where no motion is made under subsection (3), or where the motion is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if he had been a party to the action at the time the reference was directed.

than fifty years it has been common practice to have the trial of mechanics' lien actions in Toronto conducted by masters. Over the years, masters have developed great expertise in this area of the law. In light of its recommendation that part-time masters be appointed to conduct the trial of mechanics' lien actions in counties outside the Judicial District of York, the Committee endorses the proposal contained in section 59 of the Discussion Draft to permit the trial of these actions in those counties by local masters.

It should be noted that the actual authority for references is the Judicature Act, rather than the Construction Lien Act. Under section 70 of the Judicature Act, a question arising within an action may be referred to a master or local master for inquiry and report.

A reference under section 70 may be generally be made in any case. A reference under section 71 of the Judicature Act is different. Under this section either the whole action or a question within the action may be referred to the master or local master for trial. This may be done in only three situations:

1. upon consent;
2. where a prolonged examination of documents or a scientific or local investigation is required which cannot conveniently be conducted by the court directly; or

section 72 of The Judicature Act.

(2) At the trial, a judge may direct a reference to the master and a local judge may direct a reference to the local master, under section 71 or 72 of The Judicature Act.

(3) Where under subsection 1 the action has been referred to the master or local master for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action apply, to the judge or local judge of the court who directed the reference to set aside the judgment directing the reference.

(4) If no application is made under subsection 3 or where such application is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if he had been a party to the action at the time the reference was directed.

Mechanics' Lien Act Provision:

35.-(2) In the Judicial District of York, the action shall be tried by a judge of the Supreme Court, but,

(a) on motion after defence or defence to counterclaim, if any, has been delivered or the time for such delivery has

Subsection 61(1).....

3. where the question in dispute consists wholly or partly of matters of account.

Mechanics' lien proceedings will often qualify for reference under section 71 on all three of these criteria, especially as the term "account" has been widely interpreted by the courts. However, where none of these conditions are satisfied, the action must be tried by a judge or local judge: V.K. Mason Construction Ltd. v. Courtot Investments Ltd.

expired, a judge of the Supreme Court may refer the whole action to the master for trial pursuant to section 71 of the Judicature Act; or

(b) at the trial, a judge of the Surpreme Court may direct a reference to the master pursuant to section 70 or 71 of the Judicature Act.

(3) Where on motion the whole action is referred to the master for trial, any person brought into the proceedings subsequent thereto and served with a notice of trial may apply to a judge of the Supreme Court to set aside the judgment directing the reference within seven days after service of notice of trial and, if such person fails to make such application, he is bound by such judgment as if he were originally a party thereto.

61.-(1) The court may at any time make an order awarding carriage of the action to any person who has a perfected lien.

(2) Where more than one action is brought to enforce liens in respect of the same improvement, the court may,

(a) consolidate all the actions into one action; and

Section 61

This section combines sections 60 and 61 of the Discussion Draft and sections 40 and 41 of the Mechanics' Lien Act. Subsection 1 permits the court to award the carriage of a lien action to any person with a perfected lien. Since there may be many lien claimants in a lien action, it is necessary that one party be given responsibility

Discussion Draft Provision:

60. The court may make an order awarding carriage of the action to any person who has a perfected lien.

61. Where more than one action is brought to enforce liens in respect of the same improvement, the court may consolidate

Subsection 61(2).....

(b) award carriage of the action to any person who has a perfected lien.

for the conduct of the action to avoid confusion and to provide for the orderly conduct of the action. Under subsection 2, the court may consolidate two or more actions in respect of liens arising from the same improvement, and award the carriage of the action in the consolidated proceeding. In many cases, two or more separate actions may need to be commenced by different lien claimants because of the differing nature of their individual claims or the defendants to each of those claims may be different. However, consolidation of these actions is necessary because they will relate to the same factual circumstances and involve claims in rem against the same premises and contract monies.

all the actions into one action and in its discretion may award the carriage of the consolidated action to any person who has a perfected lien.

Mechanics' Lien Act Provision:

40. Where more actions than one are brought to realize liens in respect of the same land, the judge or officer having jurisdiction to try the action may, on the application of any party to any one of the actions or on the application of any other person interested, consolidate all such actions into one action and award the conduct of the consolidated action to any plaintiff as the judge or officer considers just.

41. Any lien claimant entitled to the benefit of an action may at any time apply to the judge or officer having jurisdiction to try the action for the carriage of the proceedings, and the judge or officer may make an order awarding such lien claimant the carriage of the proceedings.

62.-(1) Any person may make a motion to the court without notice to any other person at any time after,

(a) the delivery of the statements of defence, or the statements of defence to all cross-claims, counterclaims or third party claims, if any, where the plaintiff's claim is disputed; or

Section 62

This section consolidates section 62 and subsections 63(1) and (2) of the Discussion Draft, and replaces subsections 42(1), (2) and (3) of the Mechanics' Lien Act. Section 62 provides for a motion to obtain an appointment for the trial of

Discussion Draft Provision:

62.-(1) Any party may apply to the court without notice to any other party at any time after,

(a) the delivery of the statement of defence, where the plain-

(b) the expiry of the time for the delivery of these statements of defence in all other cases,

to have a day fixed for the trial of the action, or for the holding of a settlement meeting under section 63 or both.

(2) Where the court orders the holding of a settlement meeting, then at least ten days before the date appointed for the holding of the meeting, the party who obtained the appointment shall serve a notice of settlement meeting upon any person who was, on the eleventh clear day before the date appointed,

(a) subject to section 56 (default in filing defence), the owner and every other person named as a defendant in every statement of claim in respect of the action;
(b) where the lien attaches to the premises, a person with a registered interest in the premises;
(c) where the lien attaches to the premises, an execution creditor of any person described in clause (a) or (b);
(d) any other person having a preserved or perfected lien against the premises; and

an action or for the holding of a settlement meeting, or both. The concept of the settlement meeting is related to the pre-trial hearing provided for in rule 244 of the Rules of Practice. See notes under section 63.

Subsection 62(1) as redrafted provides for flexibility in the bringing of these proceedings. Since these proceedings are related, it will often be advantageous to bring them simultaneously. It was unclear whether this could be done under the Discussion Draft. In some cases, there may be no benefit in holding a settlement meeting; in other cases the parties may find that a settlement meeting is necessary after notice of trial has been given. Consequently, the Committee Draft also permits these motions to be brought separately and in any order.

Subsection 2 specifies the persons to whom notice of a settlement meeting must be given. By virtue of subsection 4, the same persons must also be served with a notice of trial, where a date for trial is fixed by the court. In light of section 56, a defendant who is in default in the filing of his defence is not entitled as such to receive notice of either the trial or the settlement meeting, although he may still be entitled to receive such notice under one of the other clauses of the section.

tiff's claim is disputed; or
(b) the expiry of the time for the delivery of the defence in all other cases,

to have a day fixed for the trial of the action and the court shall fix a date for trial.

(2) At least ten clear days before the date appointed for trial, the party who obtained the appointment shall serve a notice of trial upon any person who was on the eleventh clear day before the date appointed for trial,

(a) the owner;
(b) where the lien attaches to the premises, a person with a registered interest in the premises other than a preserved lien;
(c) where the lien attaches to the premises, an execution creditor of any person described in clause a or b;
(d) a person with a preserved lien on the pemises; and
(e) identified as a person to whom services or materials were or were to be supplied in every

Subsection 62(2).....

(e) a person joined as a third party under section 58.

(3) Where the lien does not attach to the premises, the party who obtained the appointment for the holding of the settlement meeting shall request the owner to inform him of the identity of every person described in clause (2)(d).

(4) Subject to section 56, where the court fixes a date for trial, the party who obtained the appointment shall serve a notice of trial, at least ten days before the date appointed for trial, upon any person who is or would be entitled to a notice of a settlement meeting under subsection (2).

claim for lien of every person with a preserved lien on the premises.

(3) Where a party names a person as a defendant in a cross-claim, he shall notify that person of the date appointed for trial as soon as he has notice of the date.

(4) Where the lien does not attach to the premises, the party who obtained the appointment for trial may request the owner to inform him of the identity of every person described in clause d and e of subsection 2, and where the owner fails to comply promptly, he shall be liable to any person who suffers damage that results from the failure to comply.

63.-(1) At any time after a date has been fixed for trial of the action, the court, upon the application of the party having carriage of the action, may convene a settlement meeting for the purpose of resolving or narrowing the issues to be tried under the chairmanship of any person designated by the court.

(2) All parties are entitled to take part in the settlement meeting, and the court may make such orders as it considers fit in respect to the giving of notice of the settlement meeting to all parties.

Section 62.....

Mechanics' Lien Act Provision:

42.-(1) After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, either party may apply ex parte to a judge or officer having jurisdiction to try the action to fix a day for the trial thereof, and the judge or officer shall appoint the time and place of trial, and the order, signed by the judge or officer, shall form part of the record of the proceedings.

(2) The party obtaining an appointment for the trial shall, at least ten clear days before the day appointed, serve notice of trial upon the solicitors for the defendants who appear by solicitors and upon the defendants who appear in person, and upon all the lienholders who have registered their claims as required by this Act or of whose claims he has notice, and upon all other persons having any charge, encumbrance or claim on the land subsequent in priority to the lien, who are not parties, and such service shall be personal unless otherwise directed by the judge or officer who may direct in what manner the notice of trial is to be served.

Section 62.....

63.-(1) Where a settlement meeting is ordered by the court, it shall be conducted in accordance with this section.

(2) The settlement meeting shall be conducted,

(a) by a person selected by a majority of the persons present at the meeting; or

(b) where no person is selected, by the person who took out the appointment,

and shall be for the purpose of resolving or narrowing any issues to be tried in the action.

(3) The results of the settlement meeting shall be embodied in a statement of settlement which shall summarize those issues of fact and law which have been settled by the parties.

(4) The statement of settlement shall be filed with the court and the settlement shall be attached to and form part of the record, and shall be binding upon all persons served with notice of the settlement meeting, and upon all defendants against whom pleadings

Section 63

Section 63 is based on section 63 of the Discussion Draft. It embodies and gives statutory authority to a practice that has long existed in the Supreme Court. The procedure for obtaining a date for a settlement meeting and the persons to be served with notice are set out in section 62.

Subsection 63(2) specifies who shall have control over the conduct of the settlement meeting.

Subsection 63(3) provides for the embodiment of the various issues that have been settled in a statement of settlement. Under subsection 4, this statement is filed with the court and becomes part of the trial record.

(3) Where any person interested in the land has been served with a statement of claim and makes default in delivering a statement of defence, he shall nevertheless be served with notice of trial and is entitled to defend on such terms as to costs and otherwise as the judge or officer having jurisdiction to try the action considers just.

Discussion Draft Provision:

(3) The chairman shall embody the results of the settlement meeting in a statement of settlement, which statement shall summarize,

(a) those issues of fact and law which have been settled by the parties; and

(b) those issues of fact and law which remain in dispute.

(4) The chairman shall file the statement of settlement with the court, and the statement shall be attached to and shall form part of the record and shall be binding upon the parties subject to any modification that the court considers necessary.

(5) Upon the filing of the statement with the court, the court may,

(a) if no defence has been filed to a claim for lien, declare

Subsection 63(4).....

have been noted closed under section 56, but subject to subsection 56(3), the court may vary or set aside the statement of settlement upon such order as to costs or otherwise as it considers appropriate.

(5) Upon the filing of the statement of settlement with the court, the court may,

(a) if there was no dispute at the meeting to a claim for lien, declare the lien valid and give such further judgment as it considers appropriate;

(b) enter a judgment or make a report upon consent on those issues which have been settled by the parties; and

(c) make any order that is necessary in order to give effect to any judgment or report of the court under clause (a) or (b); and

(d) make any order that is necessary for, or will expedite the conduct of, the trial.

(6) Rule 244 of the Supreme Court Rules of Practice does not apply to an action under this Act.

Subsection 4 also provides for the binding effect of the settlement on all persons served with the notice of the settlement meeting. In addition, the settlement will be binding upon any defendant against whom pleadings have been noted closed. It also provides that in appropriate circumstances the court may vary or set aside the settlement subject to an order for costs. This power to vary must be exercised within the restriction set out in subsection 56(2).

Subsection 5 sets out the authority of the court related to the statement of settlement once the statement has been filed. It empowers the court to make orders in consequence to the decisions and agreements made at the settlement meeting.

Since a settlement meeting is different from a pretrial under Rule 244 of the Rules of Practice, the rule is made inapplicable to the trial of mechanics' lien actions.

the lien valid and give such further judgment as it considers appropriate;

(b) enter a judgment upon consent on those issues which have been settled by the parties;

(c) make such orders as are necessary in order to give effect to any judgment of the court under clause a or b.

(6) Rule 244 of the Rules of Practice and Procedure does not apply to an action under this Act.

64.-(1) The results of the trial shall be embodied,

(a) in a judgment, where the trial is conducted by a judge or local judge of the court; or

Section 64

Section 64 is similar to section 64 of the Discussion Draft. It is based on clause 42(4)(c) and subsections 42(5), (6), (7) and 47(3) of the Mechanics' Lien Act. The purpose of these

Discussion Draft Provision:

64.-(1) The results of the trial shall be embodied,

(a) in a judgment, where the trial is conducted by a judge or

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(b) in a report, where the trial is conducted by a master or an appointed local master of the court on a reference. (2) The prescribed form of judgment or report may be varied by the court in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he is entitled. (3) The report of a master or an appointed local master shall be deemed to be confirmed at the expiration of the fifteen-day period next following the date that the notice of filing was given, unless a notice of appeal is served within that time. (4) The judgment or report may direct any party found liable to make a payment, to make such payment forthwith, and execution may be issued, (a) immediately, in the case of a judgment; or (b) after confirmation, in the case of a report. (5) The court may order that the interest in the premises be sold and may direct the sale to take place at any time after the judgment or confirmation of the report, allowing a reasonable time for advertising the sale. (6) The court may allow any person with a perfected lien,	provisions is to provide for the judgment of the court and for the confirmation of the report of the master. Subsection 64(6) provides for the proving of claims by those lien claimants who were not before the court at the trial. This can occur as a result of the person supplying services or materials at the time of the proceedings and not having preserved his lien claim in time to be served with a notice of trial. It may also be because of an arbitration order staying his action and not permitting him to participate in the trial. Failure to permit a claimant to prove his claim at this time would mean that the claimant would be deprived of his rights.	local judge of the court; or (b) in a report, where the trial is conducted by a master or local master of the court on a reference. (2) The form of the judgment or report may be varied by the court in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he may be entitled. (3) The report of a master or local master of the court shall be filed and shall be deemed to be confirmed at the expiration of the fifteen days from the date of service of notice of filing the report, unless a notice of appeal is served within that time. (4) The judgment or report may direct any party found liable to make a payment, to make such payment forthwith, and execution may be issued therefor, (a) immediately, in the case of judgment; or (b) after confirmation, in the case of a report. (5) The court may order that the premises be sold, and may direct the sale to take place at any time after the judgment

Subsection 64(6).....

(a) who was not served with a notice of trial; or

(b) whose action was stayed by reason of an order under the Arbitrations Act,

to be let in to prove his claim at any time before the amount realized in the action for the satisfaction of the lien has been distributed, and where his claim is allowed, the judgment or report shall be amended to include his claim.

or confirmation of the report, allowing, however, a reasonable time for advertising the sale.

(6) The court may allow any person with a perfected lien who was not served with a notice of trial and did not prove his claim at the trial to be let in to prove his claim at any time before the amount realized in the action for the satisfaction of the liens has been distributed, and where his claim is allowed, the judgment or report shall be amended so as to include his claim.

Mechanics' Lien Act Provision:

42.-(4) The judge, or where a reference for trial is directed, the master,..

(c) shall embody the results of the trial,

(i) in the case of a judge, in a judgment, and

(ii) in the case of a master, in a report,

which judgment or report may direct payment forthwith by the person or persons primarily liable to pay the amount of the claims and costs as ascertained by the judgment or report, and execution may be issued therefor forthwith in the case of a

Subsection 64(6).....

judgment and after confirmation thereof, in the case of a report.

42.-(5) The form of the judgment or report may be varied by the judge or officer in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he may be entitled.

(6) The judge or officer may order that the estate or interest charged with the lien be sold, and may direct the sale to take place at any time after judgment or confirmation of the report, allowing, however, a reasonable time for advertising the sale.

(7) A lien claimant who did not prove his claim at the trial, on application to the judge or officer before whom the action or reference was tried, may be let it to prove his claim, on such terms as to costs and otherwise as are deemed just, at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where his claim is allowed, the judgment or report shall be amended so as to include his claim.

Subsection 64(6).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		47.-(3) Where an action is referred to the master for trial under subsection 35(2), the report shall be filed and shall be deemed to be confirmed at the expiration of fifteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.
65. Subject to paragraph 3 of subsection 36(4) (sheltering), the court may award any lien claimant a personal judgment, whether he proves his lien or not, upon any ground relating to his claim that is disclosed by the evidence against any party to the action for any amount that may be due to him and that he might have recovered in a proceeding against that party.	Section 65 This section is based on section 44 of the Mechanics' Lien Act and appeared as section 65 of the Discussion Draft. Because the court has been given an expanded jurisdiction in respect of breach of contract claims, the scope of this section has likewise been expanded.	Discussion Draft Provision: 65. Where a person claiming a lien fails to prove his lien, the court may award him a personal judgment upon any ground disclosed by the evidence against any party to the action for such sum as may be due to him and which he might have recovered in an action against that party. Mechanics' Lien Act Provision: 44. Where a lien claimant fails to establish a lien, he may nevertheless recover a personal judgment against any party to the action for such sum as may appear to be due to him and which he might recover in an action against such party.
66. Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, a person with a perfected lien is entitled to share in the proceeds of sale in respect of the amount owing to him, although that amount or part thereof was not payable at the time of the	Section 66 This section is identical to section 66 of the Discussion Draft and is substantially similar to section 45 of the Mechanics' Lien Act. A person may have a valid lien even though he may not be entitled to payment under his contract at the time when the action is commenced or concluded	Discussion Draft Provision: 66. Where a premises is sold under court order, or by a trustee appointed under Part IX, a person with a perfected lien is entitled to share in the proceeds of the sale in respect of the amount owing to him, although otherwise the amount or part there-

Section 66.....

commencement of the action or at the time of the distribution of the proceeds.

(as, for example, where he has extended a long period of credit). This section permits him to realize upon his lien. It is necessary, because a lien action is a proceeding against the owner's interest in the premises. As a result, the claims of all person who have a right to claim against that interest must be disposed of in a single proceeding. If a person who was entitled to a lien were not allowed to realize upon that lien at the same time as other claimants, his lien right would be lost.

of was not payable at the time of the commencement of the action or is not then payable.

Mechanics' Lien Act Provision:

45. Where property subject to a lien is sold in an action to enforce a lien, every lienholder is entitled to share in the proceeds of the sale in respect of the amount then owing to him, although the same or part thereof was not payable at the time of the commencement of the action or is not then presently payable.

67.-(1) The court may make all orders necessary for the completion of a sale and for vesting an interest in the premises in the purchaser.

(2) Where an interest in the premises is sold under court order, or by a trustee appointed under Part IX, the proceeds of the sale shall be paid into court to the credit of the action.

Section 67

Subsection 1 is substantially the same as subsection 43(2) of the Mechanics' Lien Act and appeared as section 67 of the Discussion Draft. The effect of the section is that it is not necessary for all parties interested in the premises to join in the conveyance.

Discussion Draft Provision:

67. The court may make all orders necessary for the completion of a sale and for vesting the property in the purchaser.

Mechanics' Lien Act Provision:

(2) The judge or officer before whom the action was tried may make all necessary orders for the completion of the sale and for vesting the property in the purchaser.

Section 67.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(3) The court may add to the claim of the party having carriage of the action his fees and actual disbursements in connection with the sale. (4) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this Act. (5) Where the proceeds of the sale are not sufficient to satisfy the judgment and costs, the court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each person whose judgment is not satisfied out of the proceeds against each person who has been found liable to him.	Subsection 2 through 5 are derived from subsection 43(1) of the Mechanics' Lien Act and is identical to section 68 of the Discussion Draft. Subsections 2 to 4 provide rules to govern dealings with the proceeds of sale. Subsection 5 deals with a situation where the proceeds of sale are insufficient to satisfy the judgment and costs.	Discussion Draft Provision: 68.-(1) Where a premises is sold under court order, or by a trustee appointed under Part IX, the proceeds of the sale shall be paid into court to the credit of the action. (2) The court may add to the claims of the party having carriage of the action his fees and actual disbursements in connection with the sale. (3) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this Act. (4) Where the proceeds of the sale are insufficient to satisfy the judgment and costs, the court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each person whose judgment is not satisfied out of the proceeds against each person who has been found liable to him. Mechanics' Lien Act Provision: 43.-(1) Where a sale is had, the moneys arising therefrom shall be paid into court to the credit of the action, and the judge or officer before whom the action was tried shall direct to whom the moneys in court shall be paid and may add to the claim

Section 68.....

of the person conducting the action his fees and actual disbursements incurred in connection with the sale, and, where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons who are entitled to recover the same, showing the amount that each is entitled to recover and the persons adjudged to pay the same giving credit for payments made, if any, under subsection 42(4), and the persons so entitled may enforce payment of the amounts so found to be due by execution or otherwise.

68. Where a person believes that an amount that he has in his possession is subject to a trust under Part II, he may apply to the court for direction and the court may give such direction or make such order as the court considers appropriate in the circumstances.

Section 68

This is a new provision. It permits any person who believes that he may have come into possession of trust monies to apply to the court for directions. This provision will be of particular use to private receivers.

Section 69 of the Discussion Draft (deleted)

The Committee recommends that this section be deleted. Without expressing any opinion as to whether there is any need for a reform of the law of evidence, the Committee believes that it would be inadvisable to amend the law of evidence as it applies to a Supreme Court proceeding as an adjunct to the reform of mechanics' lien law. The Committee is unconvinced of the need for any special rules of evidence to govern the trial of mechanics' lien actions.

Discussion Draft Provision:

69.-(1) Subject to subsections 2 and 3, the court may admit as evidence in a trial or application, whether or not given or proven under oath or affirmation or admissible otherwise as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the court may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence in a trial or application,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

Section 69.....

(b) that is inadmissible under any statute.

(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purpose for which any oral testimony, document or things may be admitted or used in evidence in any proceedings.

(4) Where the court is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence in a trial or application.

(5) Where a document has been filed in evidence in a trial or application, the court may, or the person producing it or entitled to it may, with the leave of the court, cause the document to be photocopied and the court may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by the court.

(6) A document purporting to be a copy of a document filed in evidence in a trial or application, certified to be a true copy thereof by the court, is admissible as evidence of the document.

Section 69.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
69.-(1) The procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question. (2) Interlocutory proceedings, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the proceedings are necessary or would expedite the resolution of the issues in dispute. (3) Except where inconsistent with this Act, and subject to subsection (2), the Judicature Act and the Supreme Court Rules of Practice apply to pleadings and proceedings under this Act. (4) The court may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties. (5) A lien claimant whose claim is for an amount within the monetary jurisdiction of a small claims court may be represented by an agent who is not a barrister and solicitor.	Subsection 69 This section is susbstantially the same as section 50 of the Mechanics' Lien Act and section 70 of the Discussion Draft. A few subsections have been rearranged to make the effects of the section more easily discernible. Even though the amounts in issue in a lien action may be very significant, it is considered desirable to keep the action as summary as is possible. For claims of $1,000 or less, subsection 5 permits a lien claimant to be represented by a non-lawyer.	Discussion Draft Provisions: 70.-(1) The procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question. (2) Interlocutory proceedings, other than those provided by this Act, shall not be taken without the consent of the court obtained upon proof that the proceedings are necessary or would expedite the resolution of the issues in dispute. (3) The court may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties. (4) Except where inconsistent with this Act, The Judicature Act and the Supreme Court of Ontario Rules of Practice apply to proceedings under this Act. (5) A lien claimant whose claim does not exceed $1,000 may be represented by an agent who is not a barrister and solicitor.

Section 69.....

Mechanics' Lien Act Provisions:

50.-(1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

(2) Except where otherwise provided by ths Act, no interlocutory proceedings shall be permitted without the consent of the judge having jurisdiction to try the action or, in the Judicial District of York, the master, and then only upon proper proof that such proceedings are necessary.

(3) The judge or officer having jurisdiction to try the action may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or person in such way as he deems fit, the better to enable him to determine any matter of fact in question, and may fix the remuneration of any such person and direct payment thereof by any of the parties.

(4) Unless otherwise provided in this Act, the Rules of Practice and Procedure of the Supreme Court apply to proceedings under this Act.

47.-(8) Any lien claimant for an amount not exceeding $200 may be represented by an agent who is not a barrister and solicitor.

Part IX
Section 70.....

PART IX

Extraordinary Remedies

70.-(1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1), may,

(a) act as a receiver and manager and, subject to the Planning Act and the approval of the court, mortgage, sell or lease the premises or any part thereof;
(b) complete or partially complete the improvement; and
(c) take appropriate steps for the preservation of the premises.

(3) Subject to subsection 80(7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2).

Section 70

This section replaces sections 38 and 39 of the Mechanics' Lien Act and is based upon section 72 of the Discussion Draft. Basically, the proposed provision permits the appointment of a trustee to manage, sell, mortgage or lease the premises and to complete, or partially complete, the improvement.

The Committee is of the opinion that the registration of a lien should not be the condition precedent of an application for the appointment of a trustee. Rather, any person having a lien, or who has an interest in the property, should be able to apply under section 70. The proposed subsection has been amended to reflect this opinion. Subsection 2 sets out the powers of the trustee. All powers were to be exercised under supervision of the court. The power to sell or lease the premises may only be exercised with the approval of the court. Such a disposition will also be subject to the terms of the Planning Act.

As indicated in the notes under Section 71, the powers of a trustee have been expanded to allow for the receipt of rents and profits. The Committee also decided that liens on the property being administered should be a charge on rents and profits realized. The charge

Discussion Draft Provision:

72.-(1) Where there is a preserved lien against premises, any person may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as it considers appropriate.

(2) A trustee appointed under subsection 1 has the power,

(a) subject to the supervision and direction of the court, to manage, sell, mortgage or lease the premises, and
(b) upon the approval of the court, to complete or partially complete the improvement.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	should only extend, however, to the net proceeds remaining after the normal expenses of managing the property had been paid. These net proceeds should be paid into court and dealt with in the same manner as proceeds of sale under section 68 of the proposed Act.	
(4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrace that the court directs.	Subsection (4) has been amended to refer to "any interest in the premises that is to be sold," rather than just "any premises".	(3) Any premises to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance if the court so directs.
(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.	The Committee decided that subsection 70(5) should be expanded to cover the vesting of any interests in the property, such as leaseholds. The subsection has been amended to that effect.	(4) Except where the court directs that the sale be made subject to any mortgage, charge, interest or other encumbrance, any vesting order of the premises sold, made by a trustee, vests the title to the premises free from all encumbrances.
	Subsection 4 of the Discussion Draft version of this section has been deleted. Any order of sale made by a court will identify precisely the nature of the interest being sold.	(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.
		Mechanics' Lien Act Provisions:
		38.-(1) At any time after the delivery of the statement of claim, the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, may, on the application of any lien claimant,

Section 70.....

mortgagee or other person interested, appoint a receiver of the rents and profits of the property against which the claim for lien is registered upon such terms and upon the giving of such security or without security as the judge considers just.

(2) Any lien claimant, mortgagee or other person interested may make an application to the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, at any time before or after judgment, who may hear viva voce or affidavit evidence or both and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee or trustees as the

Section 70.....

result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of the appointment.

(3) Any property directed to be sold under subsection (2) may be offered for sale subject to any mortgage or other charge or encumbrance if the judge so directs.

(4) The proceeds of any sale made by a trustee or trustees under subsection (2) shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other person interested in the property so sold as their respective rights are determined, and, in so far as applicable, section 43 applies.

(5) The judge shall make all necessary orders for the completion of any mortgage, lease or sale authorized to be made under subsection (2).

(6) Any vesting order made of property sold by a trustee or trustees appointed under subsection (2) vests the title of the property free from all claims for liens, encumbrances and interests of any kind, except in cases where

Section 70.....

sale is made subject to any mortgage, charge, encumbrances or interest as hereinbefore provided.

39. At any time after delivery of the statement of claim and before judgment, or after judgment and pending the hearing and determination of any appeal, any lien claimant, mortgagee or other interested person may make an application to the judge having jurisdiction to try the action or who tried the action, as the case may be, or, in the Judicial District of York, a judge of the Supreme Court, who may hear viva voce or affidavit evidence or both and make an order for the preservation of any property pending the determination of the action and any appeal.

71.-(1) Where a labour and material payment bond is in effect in respect of an improvement, any person whose payment is guaranteed by that bond has a right of action to recover the amount of his claim, in accordance with the terms and conditions of the bond, against the surety on the bond,

Section 71

This provision was one of the many innovations proposed in the Discussion Draft. It is common practice for owners like the Crown and municipalities to obtain a bond from contractors guaranteeing that persons who supply services or materials to the contractor

Discussion Draft Provision:

74.-(1) Where there is a labour and material payment bond in effect with respect to an improvement, any person whose payment is guaranteed under that bond, subject to the terms and conditions contained

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
where the principal on the bond defaults in making the payment guaranteed by the bond. (2) Nothing in this section makes the surety liable for an amount in excess of the amount that he undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety. (3) The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all the rights of that person.	will be paid. Some contractors require a labour and material payment bond from their key sub-contractors. While the purpose of the bond is to protect the suppliers of services or materials, those suppliers cannot sue upon it, at common law, because they have no contractual relationship with the bonding company. To remedy this problem a trust form of bond has recently become common. There may still be some doubt as to the effectiveness of this bond form. Section 71 removes all doubt and permits suppliers of services or materials to sue upon a labour and materials bond. The Ontario Law Reform Commission recommend an approach similar to the one embodied in section 71 in its Report on the Proposed Extension of Guarantor's Liability on Construction Bonds, 1966.	in the bond, has a right of action on his own behalf and on behalf of all other persons whose payment is guaranteed by that bond to recover the amount of the claim or claims against the surety named in the bond where the principal named in the bond defaults in any obligation with respect to payment to the claimant. (2) In an action against a surety, the court may give judgment in favour of each person whose payment is guaranteed by the bond and all moneys recovered under the judgment shall be distributed rateably among the persons whose payment is guaranteed by the bond. (3) Nothing in this section makes the surety liable for an amount in excess of the amount that he undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety. (4) The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all rights of that person.

Section 71.....

The provisions contained in this section should be beneficial to both the construction industry and the bonding industry. At present, the concept of a guarantee is often confused with insurance, and bonding companies are sometimes blamed for undue slowness in making payment on bonds, in comparison with payment on contracts of insurance. While some delays are not faultless, a guarantor must determine the proper obligations of the person whose payment is guaranteed. These provisions should expedite and simplify the restriction of bond disputes.

Section 71 of Discussion Draft (deleted)

Subsection 71(1) of the Discussion Draft was derived from subsection 38(1) of the Mechanics' Lien Act. It provided for the appointment of a receiver of the rents and profits of the property against which a claim for lien was registered. Subsection 71(2) was a new provision which preserved or perfected liens made a charge upon the rents or profits.

Rather than having the power of a receiver to collect rents and profits set out in a separate section, the Committee decided that it would be more appropriate to include it within the

Discussion Draft Provision:

71.-(1) Where the lien attaches to the premises, any person who has a perfected lien may apply to the court for the appointment of a receiver of the rents and profits from the premises and the court may appoint a receiver upon such terms as to the giving of security or otherwise as it considers appropriate.

(2) All liens that are perfected shall be a charge upon any rents or profits recovered by the receiver.

Section 71 of the Discussion Draft.....

power of a trustee appointed under section 72 to "manage" the premises. Therefore, it was suggested that section 71 be deleted and section 72 expanded to provide for this.

Section 73 of Discussion Draft (deleted)

The Committee was of the view that any person with an interest in the premises should be able to apply for an order preserving the premises. The power of preservation should also be included under those of a trustee. Therefore, section 73 of the Discussion Draft, which was derived in part from section 39 of the Mechanics' Lien Act, has been deleted and the power to preserve the premises included under proposed subsection 72(2).

Mechanics' Lien Act Provision:

38.-(1) At any time after the delivery of the statement of claim, the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, may, on the application of any lien claimant, mortgagee or other person interested, appoint a receiver of the rents and profits of the property against which the claim for lien is registered upon such terms and upon the giving of such security or without security as the judge considers just.

Discussion Draft Provision:

73.-(1) Where the lien attaches to the premises, any person with a perfected lien may make an application to the court for an order for the preservation of the premises pending the determination of the action and any appeal, and the court may make the order where it is satisfied that the order is appropriate.

(2) The court may make a temporary order for the preservation of premises upon an application made without notice to other parties where it is satisfied that a temporary order is appropriate.

Mechanics' Lien Act Provision:

See section 39, reproduced above.

PART X

Appeals

72.-(1) Where in the course of an action a question of law arises, the court may state the question in the form of a stated case for the opinion of the Court of Appeal, and the stated case shall thereupon be set down to be heard before the Court of Appeal and notice of hearing shall be served by the party setting down the matter upon all parties concerned.

(2) The stated case shall set forth those facts material to the determination of the question raised.

Section 72

This section is derived from section 46 of the Mechanics' Lien Act and section 75 of the Discussion Draft. It permits the court to state a case to the Court of Appeal to determine a complicated question of law. The provision will seldom be used, but where an important issue of law arises in the course of an action, it is a valuable method of avoiding unnecessary delay by going directly to the Court of Appeal to resolve the uncertainty in the law. Although this is really not an appeal provision it has been placed in the Part dealing with appeals as that is where most persons might look first in an attempt to discover the existence of the procedure.

Discussion Draft Provision:

75.-(1) If in the course of an action a question of law arises, the court may state the question in the form of a stated case for the opinion of the Court of Appeal, and the stated case shall thereupon be set down to be heard before the Court of Appeal and notice of hearing shall be served by the party setting down the matter upon all parties concerned.

(2) The stated case shall set forth the facts material to the determination of the question raised.

(3) A stated case under this section shall be heard by the Court of Appeal and not the Divisional Court, despite section 17 of The Judicature Act.

Mechanics' Lien Act Provision:

46.-(1) If in the course of proceed- to enforce a lien a question of law arises, the judge or officer trying the case may, at the request of any party, state the question in the form of a stated case for the opinion of the Divisional Court, and the stated case

73.-(1) Subject to subsection (3), an appeal lies from a judgment or a report under this Act to the Divisional Court.

(2) A party wishing to appeal a judgment or report shall file and serve his notice of appeal,

(a) prior to the confirmation of the report where the appeal is in respect of a report; or

(b) within fifteen days of the date of judgment in all other cases,

but the time for filing or serving the notice of appeal may be extended by the written consent of all parties, or by a single judge of the Divisional Court where an appropriate case is made out for doing so.

Section 73

Section 73 replaces section 75 of the Draft Act and section 47 of the Mechanics' Lien Act. The Draft Act provided for the taking of appeals to the Court of Appeal rather than to the Divisional Court. Consideration of this proposal involves issues of courts administration beyond the competence of the Committee. The manner and route of appeal in the Supreme Court is currently under review as part of the review of the Supreme Court Rules of Practice Consequently, the Committee was of the opinion that appeals should not be re-routed to the Court of Appeal at this time.

Subsection 1 makes it clear that all appeals from a judgment or report under this Act go to the Divisional Court, irrespective of whether the

shall thereupon be set down to be heard before the Divisional Court and notice of hearing shall be served by the party setting down upon all parties concerned.

(2) The stated case shall set forth the facts material for the determination of the question raised, and all papers necessary for the hearing of the stated case by the Divisional Court shall be transmitted to the registrar of the Supreme Court.

Discussion Draft Provision:

76. An unconfirmed report made on a reference for trial may be appealed as prescribed by the rules of court to the judge or the local judge who directed the reference.

77.-(1) Subject to subsection 2, an appeal from a judgment or a confirmed report under this Act lies to the Court of Appeal.

(2) No appeal lies from,

(a) a judgment or a confirmed report under this Act, where the amount of the judgment or report is $1,000 or less; or,

Subsection 73(3).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(3) No appeal lies from, (a) a judgment or a report under this Act, where the amount of the judgment or report is $1,000 or less; or (b) an order made by the court on an interlocutory motion.	action is tried by a judge, local judge, master, or appointed local master. Subsection 2 provides a 15 day appeal period, but this period may be extended either upon consent or by order of the court. Subsection 3 codifies the existing prohibition against appeals from interlocutory orders of the court: Macon Drywall System Ltd. v. Hyatt Construction Ltd. As recommended in the Discussion Draft, no appeal lies where the amount of the judgment is less than $1,000.	(b) from an order made by the court on an interlocutory application. (3) An appeal under this section shall be heard by the Court of Appeal and not the Divisional Court, despite section 17 of The Judicature Act. Mechanics' Lien Act Provision: 47.-(1) Except where the amount of a judgment or report made on a reference for trial in respect of a claim or counterclaim is $200 or less, an appeal lies from any judgment or report under this Act to the Divisional Court. (2) Where a question is referred to the master for inquiry and report under subsection 35(2), an appeal lies in the manner prescribed by the rules of court. (3) Where an action is referred to the master for trial under subsection 35(2), the report shall be filed and shall be deemed to be confirmed at the expiration of fifteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.

Section 73.....

(4) The costs of an appeal shall not be governed by subsections 49(2) and (3) but, subject to any order of the Divisional Court, shall be upon the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court, and, where it exceeds that amount, upon the Supreme Court scale.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
PART XI Priorities 74. A person who has supplied services or materials in respect of an improvement may enforce his lien despite the non-completion or abandonment of the contract or a subcontract by any other person.	Section 74 This section replaces section 14 and subsection 16(2) of the Mechanics' Lien Act. It is based on section 78 of the Discussion Draft. The provision is an exception to the general rule that an owner is not liable to the lien claimant for more than he owes the contractor. It allows a person who has supplied services or materials to an improvement to enforce his lien despite the fact that the person to whom he has supplied them (or any other person above him in the payment stream) has defaulted on his contract or subcontract. In such cases, the owner's liability to the lien claimant will be limited to the holdback where there is no money owing to the person in default.	Discussion Draft Provision: 78. A person who has supplied services or materials in respect of an improvement may enforce his lien despite the non-completion or abandonment of the contract or a subcontract by any other person. Mechanics' Lien Act Provision: 14. Every subcontractor is entitled to enforce his lien notwithstanding the non-completion or abandonment of the contract by any contractor or subcontractor under whom he claims. 16.-(2) Every workman is entitled to enforce a lien in respect of any contract or subcontract that has not been completed and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the proper persons, returnable in four days after service thereof before the judge or officer having jurisdiction to try an action under this Act, that the applicant will on the return of the motion ask for judgment on his claim for lien, registered particulars of which shall accompany the notice of motion duly verified by affidavit.

Section 75.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
75. The rights of a person having a lien may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.	Section 75 This section is substantially the same as section 28 of the Mechanics' Lien Act and section 79 of the Discussion Draft. Lien rights are property rights and, therefore, can be assigned.	Discussion Draft Provision: 79. The rights of a person having a lien may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative. Mechanics' Lien Act Provision: 28. The rights of a lien claimant may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.
76.-(1) Subject to section 84, where one or more premises that are subject to an unpreserved general lien are sold, the general lien continues for the full amount of the lien against those premises that are subject to the lien, that were not sold. (2) Where a person having a preserved or perfected general lien releases the lien against one or more of the premises subject to the lien, the lien continues for the full amount of the lien against those premises which were not released.	Section 76 This section is virtually the same as section 80 of the Discussion Draft, and is a modification of section 37 of the Mechanics' Lien Act. It is the opinion of the Committee that generally speaking, a general lien should not be diminished by the sale of one of the premises to which it originally applied. While the sale or release of a premises will prevent the lien from being enforced against that premises, the Committee believes that the lien claimant should still be entitled to enforce his general lien for its full amount against those premises which the owner has retained. For example, where	Discussion Draft Provision: 80.-(1) Where one or more premises that are subject to an unpreserved general lien is sold, the general lien continues for the full amount of the lien against those premises that are subject to the lien which were not sold. (2) Where a person having a preserved or perfected general lien releases the lien against one or more of the premises subject to the lien, the lien continues for the full amount of the lien against those premises which were not released.

Subsection 76(2).....

a general lien exists for the supply of furnaces to a subdivision, and their installation, the sale by the owner on a unit-by-unit basis should not affect the right of the supplier to realize his lien for the total amount remaining unpaid against those units of the subdivision which remain unsold.

However, this provision must be read in conjunction with section 44(4) of the Act, which deals with the apportionment of a general lien, and also section 83 which may, in some circumstances, postpone recovery by a general lien claimant against a premises to the recovery of non-general lien claimants against that same premises.

Mechanics' Lien Act Provision:

37. Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying the materials may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, in case the owner has sold one or more of the buildings, the judge or officer trying the action has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

77.-(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of proceedings for the recovery, or the obtaining of a personal judgment for the claim, does not in itself merge, waive, pay, satisfy, prejudice or destroy a lien.

(2) Where any promissory note or bill of exchange has been negotiated, the person having the lien may still enforce it if he is

Section 77

This section is derived from subsections 30(1), (2) and (3) of the Mechanics' Lien Act. Subsection 30(4) has been deleted, as under the Committee Draft the extending of a period of credit does not extend the time for commencing an action.

Subsection 1 now provides that nothing short of payment for the services or materials supplied waives or satisfies a lien. It is consistent with Part I of the Committee Draft, which prohibits the contractual waiver of the rights given by the Act. Note, however, that a person may also voluntarily discharge his lien by the registration of a release in prescribed form.

Discussion Draft Provision:

81.-(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of proceedings for the recovery, or the obtaining of a personal judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy a lien unless the person having the lien agrees in writing that it has that effect.

Subsection 77(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
the holder of the promissory note or bill of exchange at the time when he proves his claim. (3) Nothing in this section extends the time for or dispenses with the requirement for the preservation or perfection of the lien.	Subsection 2 permits the lien claimant to enforce his lien where he has been paid with a promissory note or bill of exchange (such as a cheque), and it has come back to him dishonoured (as where it is returned to him marked N.S.F.). Subsection 3 provides that the taking of security or other proceedings does not extend the time for a claimant to preserve and perfect his lien.	(2) Where any such promissory note or bill of exchange has been negotiated, the person having the lien may still enforce it if he is the holder of the promissory note or bill of exchange at the time when he proves his claim. (3) Nothing in this section extends the time for or dispenses with the requirement for the preservation or perfection of the lien. <u>Mechanics' Lien Act Provision:</u> 80.-(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of any proceedings for the recovery, or the recovery of a personal judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy the lien unless the lien claimant agrees in writing that it has that effect. (2) Where any such promissory note or bill of exchange has been negotiated, the lien claimant does not thereby lose his right to claim for lien if, at the time of bringing his action to enforce it or where

Subsection 77(3).....

an action is brought by another lien claimant, he is, at the time of proving his claim in the action, the holder of such promissory note or bill of exchange.

(3) Nothing in subsection (2) extends the time limited by this Act for bringing an action to enforce a claim for lien.

(4) A person who has extended the time for payment of a claim for which he has a claim for lien in order to obtain the benefit of this section shall commence an action to enforce the claim within the time prescribed by this Act and shall register a cerficate as required by sections 24 and 26, but no further proceedings shall be taken in the action until the expiration of such extension of time.

78. Where a claim for lien is preserved by registration, the lien claimant shall be deemed to be a purchaser to the extent of his lien within the provisions of the Registry Act and Land Titles Act, but except as otherwise provided in this Act, those Acts do not apply to any lien arising under this Act.

Section 78

Section 78 of the Act is substantially similar to section 82 of the Discussion Draft and to section 21 of the Mechanics' Lien Act. The Committee has proposed minor changes to the terminology used in the section, to make it consistent with the terminology used elsewhere in the Act.

Discussion Draft Provision:

82. Where a claim for lien is preserved by registration, the person having a lien shall be deemed to be a purchaser to the extent of the lien within the provisions of The Registry Act and The Land Titles Act, but except as otherwise provided, those Acts do not apply to any lien arising under this Act.

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	The priority of the lien against other interests in the premises is protected by this provision. That priority is not only governed by this section, but also by sections 79 and 80 of the Act. Once registered, a lien will have priority over any subsequent interest in the premises, other than another lien in respect of the same improvement.	Mechanics' Lien Act Provision: 21. Where a claim is so registered, the person entitled to a lien shall be deemed to be a purchaser pro tanto and a purchaser within the provisions of the Registry Act and the Land Titles Act, but, except as herein otherwise provided, those Acts do not apply to any lien arising under this Act.
79. The liens arising from an improvement have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders except those executed or recovered upon before the time when the first lien arose in respect of the improvement.	Section 79 Section 79 replaces section 83 of the Discussion Draft and section 15(1) of the Mechanics' Lien Act. The Committee has redrafted this section in an effort to clarify its meaning, since the purpose and effect of subsection 15(1) has always been cryptic. The essential purpose of the lien created by the Act is to ensure that those who have contributed their services or materials towards the improvement of a premises will be entitled to claim against that premises in priority to the general creditors of the owner. Subsection 15(1) accomplishes this objective vis a vis judgment and execution creditors by providing that the lien will have priority over all judgments and executions, except those executed or recovered upon before the time when the first lien arose in respect of the improvement. However, where the premises has been	Discussion Draft Provision: 83. A lien has priority over all unregistered interests in the premises and over all judgments, executions, assignments, attachments, garnishments and receiving orders except those recovered, issued or made before the day on which the first lien in respect of the improvement arose. Mechanics' Lien Act Provision: 15.-(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance of mortgage after notice in writing of the lien has been given to the person making

Section 79.....

siezed in execution or recovered under a judgment prior to that time, the execution or judgment creditor will enjoy priority over the lien. The Committee believes that this is a reasonable balance between the interests of judgment creditors and lien claimants.

Since under section 20 of the Committee Draft the lien is made a charge against the holdbacks, the lien also take priority over all assignments and judicial attachments or garnishments of contract monies. This is consistent with the rights with the trust rights given to the suppliers to an improvement under the Part II trust provisions.

The priority provided to lien claimant by this section dates from the time when the first services or materials were supplied to the improvement.

such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

80.-(1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Section 80

Section 80 of the Committee Draft replaces section 84 of the Discussion Draft and subsections 8(3), (5) and (6) and section 15(1) of the Mechanics' Lien Act. It differs greatly in purpose and effect from those provisions. It will first be noted that this section has been entirely rewritten. In addition, section 80 contains provisions which replace the joint trust account provisions contained in section 24 of the Discussion Draft. These provisions are intended to provide greater security for the holdback than exists under the present law. These matters are discussed in detail under the subtitle "General Remarks", following the "Clause by Clause Analysis" of section 80.

Discussion Draft Provision:

84.-(1) Except as provided in subsections 2, 3 and 4, a lien has priority over all conveyances, agreements of sale or mortgages in respect of the premises.

Section 80.....

Clause by Clause Analysis

Subsection 1 provides in effect that the lien has priority over all unregistered interests in the premises. No equivalent provision is found in the Mechanics' Lien Act, although the effect of this provision is implicit in that Act.

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage to the extent of any deficiency in the holdbacks required to be retained under Part V, irrespective of when that mortgage is registered.

Subsection 2 provides that a lien has priority over a building mortgage to the extent of any deficiency in the holdbacks that the owner is requied to retain under Part V. This priority would apply to those mortgages which are taken by the mortgagee to secure the financing of the improvement. The priority applies irrespective of whether the mortgage was registered prior or subsequent to the first work being done on the improvement. In the opinion of the Committee, subsection 2 provides a reasonable balance between the interests of the mortgagees who finance the construction of improvements and the lien claimants who do the actual work on the improvement. It should be noted that building mortgagees enjoy the benefit of the lien claimants' work: as a result of the improvement, the mortgagee's interest will usually be secured against a property which has been enhanced in value. Therefore, it is only fair that the mortgagee's interest be partly subordinated to the liens of the suppliers to the improvement, to ensure that there will be money available to pay them for the work that

Subsection 80(2).....

they have done. Subsection 2 leaves mortgagees free to deal with the additional risks through ordinary commercial procedures, such as the adjustment of interest rates or the obtaining of alternate forms of security, and thereby avoids additional administrative costs.

It should be noted that subsection 2 gives the lien claimants priority only where the mortgage is taken by the mortgagee to secure the financing of the improvement. Thus it is the intention of the mortgagee which is relevant in determining whether a mortgage is a building mortgage.

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

Subsection 3 and 4 are similar in effect to the existing law. They specify the relative priorities between the liens arising from an improvement and mortgages, conveyances and other agreements in respect of the owner's interest in the premises that are registered prior to the commencement of the improvement. These "prior" interests are generally accorded priority over the lien. However, under subsection 3 the priority of those interests is limited in the case of advances made prior to the commencement of the improvement of the actual value of the premises at the time when the making of the improvement commences. Where advances are made in respect of those interests after this date,

Discussion Draft Provision:

(2) An agreement of sale or mortgage in respect of the premises that was registered prior to the date when the first lien arose in respect of an improvement has priority over all liens arising in respect of the improvement,

(a) to the extent of the actual value of the premises at the time when the first lien arose, for all sums advanced or secured against the premises prior to that time;

(b) to the extent of the amount of all future advances, un-

Subsection 80(3).....

(ii) advanced or secured in the case of a conveyance or other agreement.

they are entitled to priority in respect of those advances in accordance with much the same rules as apply under subsection 6, in respect to advances under subsequent interests.

less prior to the time when the advance is made, a lien has been preserved or the person making the advance has received written notice of the lien.

Mechanics' Lien Act Provision:

8.-(3) Where the land and premises upon or in respect of which any work is done or materials are placed or furnished are encumbered by a mortgage or other charge that was registered in the proper land registry office before any lien under this Act arose, the mortgage or other charge has priority over all liens under this Act to the extent of the actual value of the land and premises at the time the first lien arose, such value to be ascertained by the judge or officer having jurisdiction to try an action under this Act.

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement,

(4) The time at which the first lien arose shall be deemed to be the time at which the first work was done or the first materials placed or furnished, irrespective of whether a claim for lien in respect thereof is registered or enforced and whether or not such lien is before the court.

Subsection 80(3).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.		(5) Any mortgage existing as a valid security, notwithstanding that it is a prior mortgage within the meaning of subsection (3), may also secure future advances, subject to subsection 15(1). (6) A registered agreement for the sale and purchase of land and any moneys bona fide secured or payable thereunder has the same priority over a lien as is provided for a mortgage and mortgage moneys in subsection (3) and (5), and for the purposes of this Act the seller shall be deemed to be a mortgagee, and any moneys bona fide secured and payable under such agreement shall be deemed to be mortgage moneys bona fide secured or advanced. 15.-(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

Subsection 80(5).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(5) Where any mortgage is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained under Part V.	Subsection 5 is proposed by the Committee to redress what it believes to be a major inequity in the law resulting from the decision of the Supreme Court of Canada in Dorbern Investments Ltd. v. Provincial Bank of Canada, a case which dealt with the priority between a subsequent collateral mortgage and the lien. Under the Mechanics' Lien Act, an advance made under a mortgage that is registered subsequent to the time when the work on an improvement commences, has priority over the liens arising from that improvement, unless there was a preserved lien against the premises at the time when the advance is made, or the mortgagee had received written notice of a lien before making the advance. In the case of a collateral mortgage, all "advances" on that mortgage may have been made long before the registration of the mortgage, as in Dorbern where the mortgage was given to secure past indebtedness. As a result, in the Dorbern case, the mortgagee was held to have priority over the lien claimants: the lien claimants' interest in the premises was totally subordinated to the interest of the mortgagee, even though the property had been free of this encumbrance at the time when the making of the improvement commenced.	

Subsection 80(5).....

While the Committee does not disagree with the Supreme Court's decision as an application of the existing law, in the opinion of the Committee, to permit a subsequent collateral mortgage to take full priority over the liens is unjust. A subsequent collateral mortgage may provide no additional funds to enable the owner to pay for the work that has been done on his property. At the same time it reduces the value of the owner's interest in the premises, and thereby reduces the equity available to satisfy the lien claimants should the owner subsequently become insolvent. It should be noted that the value of the property will usually increase as a result of the improvement, and that the mortgagee will enjoy greater security than if the improvement had not been made. If there is a sale under the mortgage, the price received will reflect the improved value of the premises. Since the mortgagee will enjoy the benefit of the improvement, it is unfair for the lien claimants to suffer as a result of the reduction in the owner's equity. The liens should have priority to the extent of any deficiency in the holdback that the owner is required to retain. Providing the lien claimants with this priority protects their rights from total eradication by the registration of a subsequent collateral mortgage. At the same time, since the priority of the lien claimants is limited

Subsection 80(5).....

to the holdback which ought to be available to satisfy their lien claims, subsection 4 provides reasonable protection to mortgagees.

The Committee considered the question of whether the priority should apply only where the mortgagee has notice of the making of the improvement. A majority of the Committee concluded that it should apply regardless of the knowledge of the mortgagee. The effect of a mortgage is always to decrease the owner's equity in the premises. The effect of the improvement will almost always be to enhance the value of the premises. As a person holding a security interest in the premises, the mortgagee will enjoy the benefits of this enhancement, irrespective of his knowledge of its making. No corresponding benefit results to lien claimants as a result of the mortgage. A mortgagee has the ability to determine whether an improvement is being made, should he so desire.

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

Subsection 6 has the same effect as subsection 15(1) of the Mechanics' Lien Act in that it gives liens priority over advances on a mortgage made after a lien is preserved or notice of lien is received by the person making the advance.

Discussion Draft Provision:

(3) An agreement of sale, conveyance or mortgage that is in respect of the premises registered after the first lien arose in respect of an improvement has priority over all liens arising in respect of the improvement to the extent of all sums advanced on account of that agreement, conveyance or mortgage, unless, prior to the time

Subsection 80(6).....

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance receives written notice of a lien.

when the advance was made, a lien was preserved or the person making the advance received written notice of the lien.

Mechanics' Lien Act Provision:

15.-(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon him under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

Subsection 7 is based on subsection 38(2) of the Mechanics' Lien Act. It provides that where a trustee under Part IX exercises his powers under the section the mortgage or other interest given is free of liens. In addition, the liens will not attach to the proceeds of a mortgage since the invariable reason for obtaining such a mortgage is to acquire the funds necessary to complete the improvement. Distribution to lien claimants of any other funds realized by a trustee is governed by section 68 of the Committee Draft.

Discussion Draft Provision:

(4) All sums advanced to a trustee appointed under Part IX as a result of any powers conferred upon him by that Part, take priority over every lien existing at the date of his appointment.

Mechanics' Lien Act Provision:

38.-(2) Any lien claimant, mortgage or other person interest may make an application to the judge having jurisdiction to try the action or in the Judicial District

Subsection 80(7).....

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

of York, a judge of the Supreme Court, at any time before or after judgment, who may hear viva voce or affidavit evidence or both and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court and with power, when so directed by the court to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee or trustees as the result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of the appointment.

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

Subsection 8 is a new provision. It enables a lien claimant to postpone his claim for lien, to the interest of some other person in the premises. Where such a postponement is made, the interest of that other person will enjoy priority over the postponed lien, and over all unpreserved

Subsection 80(8).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(a) the postponed lien; and (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance, but nothing in this subsection affects the priority of the liens under subsections (2) and (5).	liens of which that person has received no written notice at the time of an advance, in accordance with the terms of the postponement. However, no such postponement will affect the priority to which the liens are entitled generally under subsections 2 and 5. Subsection 8 has been inserted in response to the numerous recommendations which were made to the Committee to provide for the registration of a "conditional discharge" of lien. In the opinion of the Committee, conditional discharges would not be workable since it would not be clear what the position of an innocent party would be if he had acted on the strength of such a discharge and the condition imposed was not subsequently met. However, the Committee is of the opinion that the Act should make express provision for the subordination of lien claims to the interest of some other person in the premises. It may sometimes be to the advantage of a lien claimant to give such a subordination. For example, the subordination of a lien claim may enable an advance to be made under a mortgage. As a result of that advance, the owner may obtain the funds which he needs to pay the lien claimant. The giving of a postponement is preferable to the registration of a discharge, since it continues the lien as an interest in the premises.	
(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the day on which this Act comes into force.	Subsection 9 provides that the priority of liens over building mortgages in subsection 2 and subsequent mortgages under subsection 4 does not	

Subsection 80(9).....

apply to a mortgage registered before this Act comes into effect. The legislation is not to have retroactive effect.

General Remarks Re Section 80:

Like its antecedents, section 80 deals with the relative priority of the lien and competing interests in the premises. However, section 80 also serves to secure the holdback (which represents ten per cent of the value of services and materials that have been supplied to the improvement of the premises) as an interest in the premises. It protects this interest from being eroded by arrears in the payment of a mortgage, particularly arrears of interest. It does this by giving the lien priority over any building mortgage, and also over any mortgage registered after the commencement of work on the improvement, to the extent of any deficiency in the holdback available to satisfy the lien claimants.

The Committee believes that it is essential to protect the holdback. The present Act does not require an actual holdback fund to be set aside by the owner. When an action proceeds to trial, the owner is often found to have no funds available to satisfy the lien claims. When the lien claimants look to the premises to realize their liens, they often find that the owner has too little equity in the premises to satisfy

Subsection 80(9).....

their claims. The Committee believes that the proposed restructuring of priorities setout in section 80 will provide the necessary protection for the holdback. It will permit the liens to be realized against the premises wherever there are insufficient contract monies available to satisfy the claims against the holdback. The Committee proposes the adoption of these provisions rather than the adoption of the joint trust account provisions found in section 24 of the Discussion Draft.

The Committee gave the joint trust account proposal extensive consideration. Essentially, the joint trust account scheme required the owner to deposit the holdback into an interest-bearing trust account on any contract where the contract price exceeded $150,000. This account was to be held in the joint names of the owner and the contractor. If this scheme had been implemented, the holdback would have ceased to be notional in nature, and would have constituted a real fund. In theory, in the event of an insolvency on the part of either the owner or the contractor, the funds in this account would have been available to satisfy any lien claims. The Committee is of the opinion that his scheme would not be practical. By its express terms, the scheme would not have applied to contracts for less than $150,000. In

Discussion Draft Provision:

24.-(1) Where the contract price of estimated price of services or materials to be supplied under a contract is $150,000 or more, the owner shall pay the holdback required to be retained by subsection 1 of section 23 into a joint trust account.

(2) Where the owner is not required by subsection 1 to pay the holdback into a joint trust account but the owner agrees in writing to do so, the holdback shall be dealt with in the same manner as if subsection 1 applied.

(3) The joint trust account required by subsection 1,

Subsection 80(9).....

the experience of the Committee, the greatest need for the protection of the holdback is often found in the case of small contracts. Thus the joint trust account proposal would not have applied in many of the cases where it is needed the most. The Committee was also concerned that a proposed joint trust account system would have been difficult to police in practice.

Perhaps the greatest problem with the joint trust account proposal was its potential cost to the industry. The scheme would have required the deposit of the holdback into a bank account, which would often have required the owner to borrow this money from the same bank in which it was to be deposited. While in the course of time the price of contracts might have been lowered as a result of the reduction of risk, and payment of interest on the holdback which the joint trust account system provided for, it is impossible to estimate how long it would take for that price adjustment to take place. In the interim, the joint trust account scheme would cause an obvious increase in the cost of construction, and if the eventual price adjustment was imperfect, this cost increase would be a permanent one. In addition, the joint trust account scheme would have imposed significant administrative costs. These costs would have been greatest in the case of major owners involved in numerous large construction projects. The scheme was also incompatible with some forms of project organization prevelant in the construction industry, particularly construction management organization.

(a) shall be opened and held in the joint names of the owner and the contractor as trustees;
(b) may be maintained at any chartered bank, trust company or other financial institution;
(c) shall be an interest bearing account;
(d) shall be held in trust for those who have a charge upon the holdback;
(e) shall require the signatures of both trustees for payment out of the account unless otherwise ordered by the court.

(4) When an owner fails to pay the holback into a joint trust account as required by subsection 1 or 2, or in any case where an owner is required to retain a holdback, the court,

(a) upon the application of any person having a lien; and
(b) where it is satisfied that the owner is required by subsection 1 or 2 to pay the holdback into a joint trust

Subsection 80(9).....

The Committee considered a number of alternatives to the joint trust account scheme to provide greater security to lien claimants. Bonding was found to be too complicated and to be only slightly less costly than the joint trust account proposal. Furthermore, the Committee found little enthusiasm for the widespread use of bonds within the bonding industry itself. The idea of an industry insurance scheme was rejected as it would require a costly bureaucracy to administer, and would impose an inestimable cost on the industry in the way of premiums.

The Committee believes that the proposals contained in section 80 will provide all necessary security to the industry at the lowest possible cost of all schemes considered. Since the erosion of the lien claimants security results from a conflict between their interest in the premises and the interests of mortgagees, it seems best to deal with this problem at its source by adjusting those priorities. In effect, the Committee is proposing that the risk of default upon the holdback be transferred to mortgagees. It seems to the Committee to be unfair that where an owner runs into financial diffifulty he loses his property, the persons who worked on the property go unpaid, and the mort-

account or that is is necessary or desirable to secure the holdback,

shall order the owner to pay the holdback into a joint trust account.

(5) Where, on the application of any person having a lien, the court is satisfied that there is a risk that the joint trust account or the holdback may not be properly administered by reason of the relationship between the owner and the contractor, it may appoint any other person to act as the contractor for the purpose of administering the joint trust account and the holdback.

(6) In determining the relationship between the owner and the contractor under subsection 5, the question of the relationship is one of fact, and the court may disregard the outward form of transactions and the separate corporate existence of the participants.

(7) Notice of an application under subsection 5 shall be given to every person who supplies services or materials directly to the contractor.

Subsection 80(9).....

gagee of that property gets not only that property but also the benefit of the unpaid suppliers' labour and materials.

Of all persons engaged in the construction industry, mortgagees generally have the best ability to assess the various risks related to construction and to allocate and spread those risks within the industry. Transferring the risk of a default on the holdback to mortgagees will not jeopardize their ability to provide financing, since they need only calculate the additional risk which they will run and factor that new risk into the prices which they charge their customers. As the Committee has noted, this risk is likely to be least in the case of large owners, who are responsible for a large portion of the construction in this province. One advantage of the priority adjustment proposed by the Committee in section 80 is that it will probably result in little increase in the price of mortgages to such owners, because mortgagees will face little additional risk with respect to them. Thus unlike the joint trust account and other alternatives considered by the Committee, section 80 should not result in a significant increase in the cost of construction in those cases where additional protection is least required.

(8) Where two-thirds of the number of persons entitled to notice under subsection 7 agree with the owner that the contractor or any other person shall be the contractor for the purpose of administering the joint trust account and the holdback, that agreement is binding on all other persons.

(9) This section does not apply where the owner is the Crown or a municipality.

Section 81.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
81. All persons having a lien who have supplied services or materials to the same payer comprise a class, and a person who has supplied services or materials to more than one payer is a member of every class to the extent to which his lien relates to that class.	Section 81 This section was first presented as section 85 of the Discussion Draft. Minor changes have been made to the terminology used in the section. The definition of class in this section reflects the decisions of the courts. As the result of subsection 17(2) of the Committee Draft, the total value of the liens of all members of a class are limited to the sum owed in respect of the improvement to the payer of the class.	Discussion Draft Provision: 85. All persons having a lien who have supplied services or materials to the same person in respect of an improvement comprise a class, and a person who has supplied services or materials to more than one person is a member of every class to the extent to which his lien relates to that class.
82.-(1) Except where it is otherwise provided by this Act, (a) no person having a lien is entitled to any priority over another member of the same class; (b) all amounts available to satisfy the liens in respect of an improvement shall be distributed rateably among the members of each class according to their respective rights; and (c) the lien of every member of a class has priority over the lien of the payer of that class. (2) Any conveyance or mortgage in respect of the premises to any person entitled to a lien on the premises, in payment of or as security for that claim, whether given before	Section 82 This section replaces subsections 15(2) and (3) of the Mechanics' Lien Act. Clauses 82(1)(a) and (b) provide for equal distribution to all members of a class, that is, the persons who supply services and materials to the same payer. The major exceptions to this are the priority afforded to workers under section 83 and section 84 that provides for the liens of general lien claimants. Clause 82(1)(c) provides for payment of lien claimants in reverse contractual order. Those who are at the bottom of the construction pyramid are entitled to payment before persons above them in the same payment stream.	Discussion Draft Provision: 86.-(1) Except where it is otherwise provided by this Act, (a) no person having a lien is entitled to any priority or preference over another member of the same class; (b) the holdbacks and the proceeds of any sale of the premises shall be distributed rateably among the members of each class according to their respective rights; and (c) the lien of every member of a class has priority over the lien of any person to whom the class supplied services or materials.

Subsection 82(2).....

or after that lien arises, is void against all other persons entitled to a lien on the premises.

Subsection 82(2) is derived from subsection 15(3) of the Mechanics' Lien Act. Its purpose is to prevent one lien claimant from obtaining priority over his fellows by obtaining additional security in the form of a conveyance or mortgage on the premises. However, any forms of additional security for payment that do not relate to the premises improved may still be obtained by a supplier. Thus, for example, a supplier may obtain a personal guarantee from the principal of his corporate payer.

(2) Any conveyance or mortgage in respect of the premises given to any person entitled to a lien on the premises in payment of or as security for that claim, whether given before or after that lien arises is void against all other persons entitled to a lien on the premises.

Mechanics' Lien Act Provision:

15.-(1) Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money is entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders ranks *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

(3) Any conveyance, mortgage or charge of or on land given to any person entitled to a lien thereon under this Act in payment of or as security for any such claim whether given before or after such lien claim has arisen shall, as against other parties entitled to liens under this Act, on any such land be deemed to be fraudulent and void.

Section 83.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
83.-(1) The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the amount of forty regular-time working days' wages. (2) Where monetary supplementary benefits are payable to a workers' trust fund instead of to a worker, the trustee of the workers' trust fund is subrogated to the rights of the worker under this Act with respect to those benefits. (3) Every device to defeat the priority given to workers by this section is void.	Section 83 Section 83 replaces section 87 of the Discussion Draft and section 16 of the Mechanics' Lien Act. While the terminology used in section 83 has been modified from that used in section 87, these changes have been made for the sake of clarity only. However, the Committee believes that the priority accorded to workers in respect of their wage claims should be increased from thirty working days' wages to forty working days' wages, and subsection 1 has been amended to reflect this position. It is now clear that this priority is limited to the extent of the normal (or regular-time) wages of the worker. Subsection 2 is designed to meet a new development within the field of labour relations, namely the development of trusts for workers' benefits. As has been noted earlier, the Committee Draft permits the trustees of workers' trust funds to enforce the claims of workers in respect to the portion of their wages which are payable to the fund rather than to the workers themselves. These funds include those established for vacation pay, health and welfare benefits. Subsection 2 provides for the subrogation of the trust fund to the rights of the worker to the extent of the money owed to the fund. In effect, this means that the individual workers are disentitled from their lien right to the extent of the subrogation. The claims for monies owed to the fund must be made by the trustees of that	Discussion Draft Provision: 87.-(1) The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the lesser of, (a) the value of thirty working days' wages; and (b) the amount justly owing to the contractor or subcontractor, and all such workers rank thereon on equal footing. (2) Where monetary supplementary benefits are payable to a worker's trust fund instead of a worker, the trustee of the worker's fund is with respect to those benefits subrogated to the rights of the worker. (3) Every device by an owner, contractor or subcontractor to defeat the priority given to workers by this section is void. Mechanics' Lien Act Provision: 16.-(1) Every workman whose lien is for wages has priority to the extent of thirty days wages over all other liens derived through the same contractor or subcontractor to the extent of and on the 15 per cent directed to be retained by

Subsection 83(3).....

fund. This is the only practical way to provide for the protection of those trust funds.

It should be noted that the special procedural provisions for the enforcement of lien claims by workers in respect to their wages, which were found in section 16 of the Mechanics' Lien Act, have been deleted. The Committee concurs in the observation contained in the Discussion Paper, that those provisions would be inappropriate in the case of a claim by a workers' trust fund, and notes that they have not been much used in the recent past. The Committee points out that individual workers may enforce their wage claims summarily under the Master and Servant Act and may also obtain relief under the Employment Standards Act.

section 12 to which the contractor or subcontractor through whom the lien is derived is entitled, and all such workmen rank thereon pari passu.

(2) Every workmen is entitled to enforce a lien in respect of any contract or subcontract that has not been completed and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the proper persons, returnable in four days after service thereof before the judge or officer having jurisdiction to try an action under this Act, that the applicant will on the return of the motion ask for judgment on his claim for lien, registered particulars of which shall accompany the notice of motion duly verified by affidavit.

(3) If the contract has not been completed when the lien is claimed by a workman, the percentage shall be calculated on the value of the work done or materials placed or furnished by the contractor or subcontractor by whom the workman is employed, having regard to the contract price, if any.

Subsection 83(3).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		(4) Every device by an owner, contractor or subcontractor to defeat the priority given to a workman for his wages and every payment made for the purpose of defeating or impairing a lien are void.
84. Where a general lien is realized against a premises in an action in which other liens are also realized against the premises, (a) the general lien shall rank with the other liens according to the rules of priority set out in section 82 only to the extent of, (i) the total value of the general lien, divided by (ii) the total number of premises to which the person having the general lien supplied services or materials under his contract or subcontract; and (b) in respect of the balance of the general lien, it shall rank next in priority to all other liens against the premises, whether or not of the same class.	Section 84 This is a new provision, dealing with the relative priority of general lien claims against non-general lien claims in respect of the same premises. For a discussion of general liens, see the notes under section 20. The purpose of this provision is to prevent the general lien provisions of the Act from operating to the prejudice of those lien claimants who have supplied services or materials only to the premises against which the general lien claim is being made. Since the purpose of the lien is to protect those who have contributed to the improvement of a premises, it is only fair that the claims of general lien claimants be postponed in favour of those persons who have supplied only to a single premises to the extent that their general lien claims do not relate to that premises. Section 84 provides a formula for determining the extent of this postponement.	

Section 85.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
85. Where a premises that is subject to a lien is destroyed in whole or in part, any amount received by the owner or a mortgagee by reason of any insurance on the premises shall take the place of the premises so destroyed and shall be distributed in accordance with the priorities set out in this Part.	Section 85 This section replaces section 9 of the Mechanics' Lien Act and section 89 of the Discussion Draft. A number of modifications distinguish this section from its earlier versions. Section 9 applied only to fire insurance. The Discussion Draft recommended that the protection afforded by this section be extended to cover all insurance. The Committee endorses this recommendation. The Committee has drafted section 85 in an effort to clarify how the proceeds of insurance are to be distributed.	Discussion Draft Provision: 89. Where any premises upon which a lien attaches is destroyed in whole or in part, all sums received by an owner or prior mortgagee by reason of any insurance on the premises shall take place of the premises so destroyed and, after satisfying any mortgagee or charge in the manner and to the extent set out in section 85, is subject to all liens to the same extent as if the sums had been obtained from a sale of the premises in an action. Mechanics' Lien Act Provision: 9. Where any of the property upon which a lien attaches is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed and is, after satisfying any prior mortgagee or charge in the manner and to the extent set out in subsection 8(3), subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in an action to enforce the lien.

Section 86.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
	Section 90 of the Discussion Draft (deleted) The Committee recommends the deletion of this section. It is unclear what it is supposed to mean. The Act makes exhaustive provision in respect to priorities. If a person obtains priority over the liens arising from an improvement within the terms of the Act, that priority should not be open to challenge. Any fraudulent transaction or sham in an attempt to circumvent the Act would be disregarded by the court, as in the recent case of Hart Hotel & Restaurant Equipment Inc. v. Carfa et al.	90. Every device by a person and every payment made for the purposes of defeating or impairing a lien is void.
86. Where an interest in the premises is sold or leased under an order of the court or by a trustee appointed under Part IX, the proceeds received as a result of that disposition, together with any amount paid into court under subsection 67(2), shall be distributed in accordance with the priorities set out in this Part.	Section 86 This section replaces section 91 of the Discussion Draft. Section 91 was a new provision which codified the practice under the Mechanics' Lien Act. This practice resulted from the incorporation by reference of section 43 of the Act into section 38(4) of the Act (disposition of the proceeds of sale by a trustee).	Discussion Draft Provision: 91. Where the premises are disposed of or encumbered under an order of the court or by a trustee appointed under Part IX, the proceeds shall be distributed in accordance with the priorities established by this Part. Mechanics' Lien Act Provision: 43.-(1) Where a sale is had, the moneys arising therefrom shall be paid into court to the credit of the action, and the judge or officer before whom the action was tried shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the action his fees and actual disbursements

87.-(1) Subject to section 10, all beneficiaries of the trust under Part II who have a lien have priority in the distribution of trust money over those beneficiaries of the trust whose liens have expired.

Section 87

This section replaces section 88 of the Discussion Draft. No similar provision is found in the Mechanics' Lien Act. Under the normal rules of equity, a trustee is required to distribute trust moneys rateably among all the bene-

incurred in connection with the sale, and, where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons who are entitled to recover the same, showing the amount that each is entitled to recover and the persons adjudged to pay the same, giving credit for payments made, if any, under subsection 42(4), and the persons so entitled may enforce payment of the amounts so found to be due by execution or otherwise.

38.-(4) The proceeds of any sale made by a trustee or trustees under subsection (2) shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, in so far as applicable, section 43 applies.

Discussion Draft Provision:

88.-(1) All beneficiaries of the trust under Part II who have a lien have priority in the distribution of trust moneys over other beneficiaries of the trust.

Subsection 87(2).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
(2) Priority in the distribution of trust moneys between those beneficiaries who have liens shall be in accordance with the respective priorities of their liens as set out in this Part. (3) Priority in the distribution of trust moneys between those beneficiaries whose liens have expired shall be in accordance with the respective priorities to which those liens would have been entitled as set out in this Part had those liens not have expired.	ficiaries of the trust. The Committee Draft, reflecting in part the decisions of the courts, greatly modifies this rule. First, under section 10 any payment made in the ordinary course of business during the course of construction will discharge the trust: see Guarantee Trust Co. of Canada v. Beaumont. Second, under section 87 priority in the distribution of trust funds is given to those beneficiaries whose liens have not expired. The preservation and perfection of lien claims requires deligence. It is only fair for those who have taken care to protect their interests to be given priority over those who have not taken such steps. Subsection 3 is a departure from the present law. It continues the general scheme of priority in the distribution of trust funds, even among trust beneficiaries whose liens have expired. In the opinion of the Committee, the same considerations which militate in favour of granting priority to a particular type of lien claimant are no less cogent where a person of that type makes a claim as a trust beneficiary.	(2) Priority in the distribution of trust moneys between beneficiaries who have liens shall be in accordance with the priorities set out in this Part.

PART XII

Miscellaneous Rules

88.-(1) Subject to subsection (2), any order as to the costs in an action, application, motion or settlement meeting is in the discretion of the court, and an order as to costs may be made against,

(a) any party to the action, application or motion; or

(b) the solicitor or agent of any party to the action, application or motion, where the solicitor or agent has,

(i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or

(ii) by his conduct prejudiced or delayed the conduct of the action,

and that order may be made on a solicitor and client basis, including where the motion is heard by, or the action has been referred under section 60 to, a master or an appointed local master.

Section 88

Section 88 replaces section 92 of the Discussion Draft and section 49 and 47(4) of the Mechanics' Lien Act. It confers greater discretion upon the court in respect to costs than has existed until now. The Committee is of the opinion that the existing rigid cost rules may sometimes lead to unfairness. Throughout the Act, the Committee has recommended the adoption or provisions which will discourage the making of unreasonable lien claims. The Committee believes that a flexible cost provision will help to prevent the abuse of the remedies afforded by the Act.

The Committee has provided the court with a power to award costs against a solicitor, where he has been guilty of misbehaviour. A solicitor is an officer of the court as well as an advocate. He is under a duty to protect the legal system from abuse. Where he knowingly participates in the prosecution of an invalid or grossly exagerated claim, or personally causes a prolongation of the resolution of a dispute, he is in breach of his duty to the court.

Discussion Draft Provision:

92.-(1) Subject to subsection 2, any order as to costs in an action, application or settlement meeting under this Act is in the discretion of the court and such order may be made against,

(a) any party to the action or application; or

(b) the solicitor or agent of any party to the action or application where the solicitor or agent has misconducted himself.

(2) Where the least expensive course is not taken by a party, the costs allowed to him shall not exceed what would have been incurred if the least expensive course had been taken.

(3) The costs of an appeal, except as provided by order of the court hearing the appeal, shall be upon the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court, and, where

Subsection 88(2).....

(2) Where the least expensive course is not taken by a party, the costs allowed to him shall not exceed what would have been incurred had the least expensive course been taken.

(3) Except where otherwise ordered by the court hearing an appeal, the costs of an appeal shall be on the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court and where it exceeds that amount shall be on the Supreme Court scale.

it exceeds that amount, upon the Supreme Court scale.

Mechanics' Lien Act Provision:

49.-(1) Subject to subsection (2), (3), (4) and (5), any order as to costs in an action under this Act is in the discretion of the judge or officer who tries the action.

(2) The costs of the action, exclusive of actual disbursements, awarded to the plaintiffs and successful lienholders, shall not exceed in the aggregate 25 per cent of the total amount found to have been actually due on the liens at the time of the registration thereof, and shall be apportioned and borne in such proportion as the judge or officer who tries the action may direct, but in making the apportionment he shall have regard to the actual services rendered by or on behalf of the parties respectively, provided that, where a counterclaim is set up by a defendant, the amount and apportionment of the costs in respect thereof are in the discretion of the judge or officer who tries the action.

Section 88(3).....

(3) Where costs are awarded against the plaintiff or other persons claiming liens, they shall not exceed, except in the case of a counterclaim, 25 per cent of the claim of the plaintiff and the other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or officer who tries the action may direct.

(4) Where the least expensive course is not taken by a plaintiff, the costs allowed to him shall in no case exceed what would have been incurred if the least expensive course had been taken.

(5) Where a lien is discharged or vacated under section 29 or where judgment is given in favour of or against a claim for a lien, in addition to the costs of the action, the judge or officer who tries the action may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration thereof, but this does not apply where the claimant fails to establish a valid lien.

Section 88(3).....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
		47.-(4) The costs of an appeal shall not be governed by subsections 49(2) and (3) but, subject to any order of the Divisional Court, shall be upon the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court and, where it exceeds that amount, upon the Supreme Court scale.
89.-(1) Subject to subsection (3) and, except where otherwise ordered by the court, all documents and notices required to be given or that may be given under this Act are sufficiently given if served personally on the intended recipient, or if sent by certified or registered mail addressed to him at, (a) his address for service, if there is one; or (b) his last known mailing address according to, (i) the records of the person sending the document, or (ii) the most recently registered instrument identifying him as a person having an interest in the premises. (2) In the absence of evidence to the contrary, a document or notice sent to a person by certified or registered mail shall	Section 89 Section 89 replaces section 93 of the Discussion Draft and section 51 of the Mechanics' Lien Act. It provides greater flexibility in respect to the serving of documents and notices under the Act. It should be noted that section 89 generally permits the service of documents and notices either personally or through the use of certified mail or registered mail. Subsection 2 creates a rebutable presumption of service where a document is sent to a person through the mail. Subsection 3 generally requires that statements of claim, notices of trial or settlement meetings, and, of appeal, and notices under section 19 be served personally since service of these documents by mail would not normally be appropriate. However, in an a suitable case, the court may make an order for substitutional service.	Discussion Draft Provision: 93.-(1) Subject to subsection 3 and except where otherwise ordered by the court, all documents required to be given under this Act are sufficiently given if given personally to the intended recipient or if sent by registered mail addressed to the intended recipient at, (a) his address for service, if there is one; or (b) the last known mailing address of the intended recipient according to the records of the person sending the documents, where there is no address for service. (2) A document given to the intended recipient by registered mail shall, in the absence of evidence to the contrary, be

Subsection 89(2).....

be deemed to have been received by him on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays.

(3) Except where otherwise ordered by the court, the following shall not be sent by certified or registered mail but shall be served personally upon the intended recipient:

1. Statement of claim.
2. Notice of trial or settlement meeting.
3. Notice under subsection 19(1).
4. Notice of appeal.

(4) Where a document or notice is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing.

deemed to have been given on the fifth day, excluding Saturdays and holidays, following the date on which it was mailed.

(3) Except where otherwise ordered by the court, the following documents shall not be sent by registered mail,

(a) a statement of claim;
(b) a notice of trial;
(c) a request to be informed of the substantial performance of the contract; and
(d) a notice under section 20.

(4) Where a document is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing.

<u>Mechanics' Lien Act Provision</u>:

51. Except where otherwise directed by the judge having jurisdiction to try the action or, in the Judicial District of York, the master, all documents relating to an action under this Act, other than statements of claim and notices of trial, are sufficiently served upon the intended recipient if sent by registered mail addressed to the intended recipient at his address for service.

Section 90.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
90. The Lieutenant Governor in Council may make regulations, (a) prescribing forms and providing for their use; (b) prescribing the appropriate offices of the Crown to which claims for lien must be sent; (c) prescribing the form and manner of publication of copies of certificates and declarations of substantial performance under section 32.	Section 90 Section 90 replaces section 94 of the Discussion Draft and section 53 of the Mechanics' Lien Act. Clauses b and d of the Discussion Draft version of this section have been deleted. Under the new Act there are no requirements for the posting of notices on building sites. In the opinion of the Committee, those requirements which exist under the present Act are rarely compiled with and are difficult to enforce. The fees payable by the parties to an action are now fixed under the Administration of Justice Act.	Discussion Draft Provision: 94. The Lieutenant Governor in Council may make regulations, (a) prescribing forms and providing for their use; (b) providing for and requiring the posting of notices on building sites; (c) prescribing the appropriate offices of the Crown to which claims for lien must be sent; (d) prescribing fees payable by the parties to an action. Mechanics' Lien Act Provision: 53. The Lieutenant Governor in Council may make regulations, (a) prescribing forms and providing for their use; (b) providing for and requiring the posting of notices on building sites; (c) prescribing the appropriate offices of the Crown to which notice of a claim for lien must be sent.

Section 91.....

COMMITTEE'S PROPOSAL FOR THE CONSTRUCTION LIEN ACT	EXPLANATION OF COMMITTEE PROPOSAL	CORRESPONDING SECTION OF DISCUSSION DRAFT AND EXISTING MECHANICS' LIEN ACT
91. Sections 1 to 51 and section 53 of the Mechanics' Lien Act, being chapter 261 of the Revised Statutes of Ontario, 1980, are repealed.	Section 91 This section provides for the repeal of the Mechanics' Lien Act. The Committee is informed that section 52, which provides a repairer's lien, is to be retained, as a separate statute, pending the development of new legislation in this area.	Discussion Draft Provision: 95. The following are repealed: 1. The Mechanics' Lien Act, being chapter 267 of the Revised Statutes of Ontario, 1970. 2. The Mechanics' Lien Amendment Act, 1975, being chapter 43.
92.-(1) This Act comes into force on the 1st day of July, 1982, and applies to all contracts entered into on or after that date and to the subcontracts arising under those contracts and to all services or materials supplied thereunder. (2) Despite section 91, the Mechanics' Lien Act continues to apply to all contracts entered into before the 1st day of July, 1982, and to the subcontracts arising under those contracts and to all services or materials supplied thereunder. (3) Despite section 91, where a contract entered into before the 1st day of July, 1982 is amended in good faith on or after that date, the Mechanics' Lien Act applies to that amendment and to all subcontracts arising under it and to all services or materials supplied thereunder.	Section 92 This section deals with transitional matters.	Discussion Draft Provision: 96.-(1) This Act comes into force on the 1st day of January, 1982 and applies to all contracts entered into on or after that date and to the subcontracts arising under those contracts. (2) Despite section 95, the Acts mentioned therein continue to apply to all contracts entered into before the 1st day of January, 1982, and to the subcontracts arising under those contracts.
93. The short title of this Act is the Construction Lien Act, 1982.	Section 93 This section is self-explanatory.	97. The short title of this Act is The Construction Lien Act, 1981.

A P P E N D I C E S

APPENDIX I

TABLE OF CONCORDANCE:

CONSTRUCTION LIEN ACT TO MECHANICS LIEN ACT

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
1(1)1	-	1(1)1
1(1)2	-	-
1(1)3	-	1(1)2
1(1)4	1(1)(b)	1(1)3
1(1)5	-	1(1)4
1(1)6	1(1)(c)	1(1)6
1(1)7	-	1(1)8
1(1)8	6(1) part	1(1)9
1(1)9	1(1)(d)	1(1)10
1(1)10	-	-
1(1)11	-	-
1(1)12	1(1)(e)	1(1)11
1(1)13	-	1(1)12
1(1)14	-	-
1(1)15	1(1)(f)	1(1)13
1(1)16	-	1(1)14
1(1)17	12(2) part	1(1)15
1(1)18	-	-
1(1)19	6(1) part	1(1)16
1(1)20	6(1) part 12(1) part	1(1)17
1(1)21	-	1(1)20
1(1)22		
1(1)23		

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
1(1)24	1(2) 6(5)	1(1)22
1(1)25	1(1)(i)	1(1)23
1(1)26	1(1)(j)	1(1)24
1(1)27	-	1(1)25
1(1)28	-	-
1(2) 1(3)	6(1),(3) & (4) part 6(1),(3) & (4) part	1(2) 1(3)
2(1)	1(3)	2(1)
2(2)	1(4)	2(2)
3	2	3
4	5	4
5	12(9)	5
6	19	6
7(1)	3(4)	7(1)
7(2)	3(3)	7(2)
7(3)	-	-
7(4)	-	7(3)
8(1)	3(1)	8(1)
8(2)	-	8(2)
9	-	-
10	-	9
11	3(2)(5) & (6)	11
12	-	-
13	-	13

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
14(1)	6(1) part	15
14(2)	-	-
15	6(4)	16
16	6(2)	17
17(1)	6(1) 10 11	18(1)
17(2)	-	-
17(3)	-	18(2)
17(4)	-	18(3)
18	7	19
19	8	20
20	37	21
21	12(5)	22
22(1)	12(1)	23(1)
22(2)	-	23(2)
22(3)	-	23(3)
23	-	-
24	12(7)	25
25	12(3)	26
26	12(8)	27
27	-	28
28	13	29
29	-	30
30	12(10)	31
31	22	32

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
32	-	33
33	12(2) part	34
34(1)	17(1) 24(1) 25(1)	35(1)
34(2)	23(3)	35(2)
34(3)	23(4)	35(3)
34(4)	17(1)	35(4)
34(5)	17(2)	35(5)
34(16)	-	35(7)
34(5)	18(1)	35(8)
35	-	36
36	26 27	37
37	24(3)	38
38	-	-
39(1)	32(1)	39(1)
39(2)	32(2)	39(3)
39(3)	-	-
39(4)	-	-
39(5)	32(1) & (2)	39(4)
39(6)	28(3)	39(5)
40	-	40
41	29(1)	41(1)
42	-	41(2)
43	-	-

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
44(1)	29(2)	42(1)(3)& (10)
44(2)	-	-
44(3)	-	-
44(4)	-	42(2)
44(5)	29(6)	42(4)
44(6)(7)	29(3) & (4)	42(5)
44(8)	-	42(7)
44(9)	-	42(6) & (8)
45	29(5)	43
46	24(3)	44
47	41(4)	45
48	-	46(1)
49	29(7)	46(2) & (3)
50	33(1) 34	47
51	35(1) & (2)	48
52	-	50
53	42(4)(a) & (b)	51
54	42(9)	52
55(1)	33(2)	55(1)
55(2)	33(3)	55(2)
55(3)	-	55(3)
56	-	-
57	-	56
58	-	56(2)
59	33(5)	58

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
60	35(2) & (3)	59
61	40 41	60 61
62	42(1)(2) & (3)	62 63(1) & (2)
63	-	63
64	42(4)(c), 42(5),(5)(6)(7) 47(3)	64
65	44	65
66	45	66
67	43	67
68	-	-
69	50	70
69(5)	42(5)	70(5)
70	38	71 72
71	-	74
72	46(1)	75
73	47	75
74	14 16(2)	78
75	28	79
76	37	80
77	30(1)(2)(3)	81
78	21	82
79	15(1)	83
80(1)	-	84(1)
80(2)	-	-

Appendix I...

COMMITTEE DRAFT	MECHANICS' LIEN ACT	DISCUSSION DRAFT
80(3)	8(3)(4) part	84(2)
80(4)	8(3)(4) part	84(2)
80(5)	-	-
80(6)	15(1)	84(3)
80(7)	(3) & (2)	84(4)
80(8)	-	-
80(9)	-	-
81	-	85
82	15	86
83	16	87
84	-	-
85	9	89
86	38(4) 43	91
87	-	88
88	49 47(4)	92
89	51	93
90	53	94
91	-	95
92	-	96
93	-	97

APPENDIX II

TABLE OF CONCORDANCE

MECHANICS LIEN ACT TO CONSTRUCTION LIEN ACT

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
1(1)(a)	deleted	deleted
1(1)(b)	1(1)4	1(1)3
1(1)(c)	1(1)6	1(1)6
1(1)(c)	1(1)9	1(1)10
1(1)(d)	1(1)12	1(1)11
1(1)(e)	1(1)12	1(1)13
1(1)(f)	1(1)15	1(1)18
1(1)(g)	deleted	1(1)21
1(1)(h)	1(1)22	1(1)23
1(1)(i)	1(1)25	1(1)24
1(1)(j)	1(1)26	1(1)22
1(2)	1(1)24	2(1)
1(3)	2(1)	2(2)
1(4)	2(2)	3
2	3	8(1)
3(1)	8(1)	11
3(2)	11	7(2)
3(3)	7(2)	7(1)
3(4)	7(1)	11
3(5)	11	11
3(6)	11	13
3(7)	13	14
4	deleted	4

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
5	4	1(1)9
6(1)	1(1)8 1(1)19 1(1)20 1(2) 14(1) 17(1)	1(1)16 1(1)17 1(2) 15(1) 18(1) 17
6(2)	16	1(2)
6(3)	1(2)	
6(4)	1(3)	1(3)
6(5)	1(1)12 1(1)24	1(1)11 1(1)22
7	18	19
8(1)	19(1)	20(1)
8(2)	19(2)(3)(4)	20(2)
8(3)	80(3)(4)	84(2)
8(4)	15 80(3)(4)	16 84(2)
8(5)	deleted	deleted
8(6)	80(3)(4)(6)	80(2)(3)
9	85	89
10	17(1)	18(1)
11	17(1)	18(1)
12(1)	1(1)20 22(1)	1(1)(17) 23(1)
12(2)	1(1)17 25	1(1)15 26
12(3)	deleted but see s.31(5)	34(3)

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
12(4)	32(1)7	33(1)4 34(1)4
12(5)	21	22
12(6)	24	25
12(7)	24 29	25 30
12(8)	26	27
12(9)	5	5
12(10)	30	31
13	28	29
14	74	78
15(1)	80(4)(6)	84(2)(3)
15(2)	82(1)	86(1)
15(3)	82(2)	86(2)
16(1)	83(1)	87(1)
16(2)	74	78
16(3)	deleted	deleted
16(4)	83(3)	87(3)
17(1)	34(1)(4)	35(1)(4)
17(2)	34(5)	35(5)
17(3)	deleted but see s.16(3)	deleted
18	34(7)	35(8)
19(1)	6(1)	6(1)
19(2)	6(2)	6(2)
20	deleted	deleted

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
21	78	82
22	31 34(1)	32 35(1)
21(1)	deleted	deleted
23(2)	34(1)(b)	35(1)(b)
23(3)	34(2)	35(2)
23(4)	34(3)	35(3)
23(5)	deleted	deleted
23(6)	deleted	deleted
23(7)	34(4)	35(4)
24(1)	34(1)	35(1)
24(2)	36(3)(a)	37(3)(a)
24(3)	37 46	38 44
24(4)	deleted	deleted
25	34	35
26	36	37
27	36	37
28	75	39
29(1)	41	41(1)
29(2)(a)	44	42(1)(3)(10)
29(2)(b)	47	45
29(2)(c)	47	45
29(3)	44(6),(7)	44(5)
29(4)	55(6)	44(5)
29(5)	45	43

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
29(6)	44(5)	44(6)
29(7)	48 49	46
30(1)(2)(3)	77	81
30(3)(4)	deleted	deleted
31	deleted	deleted
32(1)	39(1)(4)	39(1)(4)
32(2)	39(2)(5)	39(3)(4)
32(3)	39(6)	39(5)
33(1)	50(1)	47(1)
33(2)	55(1)	55(1)
33(3)	55(2)	55(2)
33(4)	56(1)	55(4)
39(5)	59	58
39(6)	deleted	deleted
34	50(3)	deleted
35(1)	51(2)	48(2)
35(2)	51(1) 60(1)	48(1) 59(1)
35(3)	60(3)(4)	59(3)(4)
35(4)	52	50
36	52	50
37	20 76	21 80
38(1)	deleted	71(1)
38(2)(3)(4)(5)(6)	70 80(7)	72 84(4)

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
39	deleted	73
40	61	61
41	61	60
42(1)	62(1)	62(1)
42(2)	62(2)	62(2)
42(3)	deleted	62(2)
42(4)(a)(b)	53	51
42(4)(c)	64(1)(4)	64(1)(4)
42(5)	64(2)	64(2)
42(6)	64(5)	64(5)
42(7)	64(6)	64(6)
42(8)	69(5)	70(5)
42(9)	54	52
42(10)	deleted	54
43	67 68 86	67 68 91
44	65	65
45	66	66
46	72	75
47(1)	73(1)(3)	77(1)(3)
47(2)	73(2)	76 77(1)64(3)
47(3)	64(3)	92(3)
47(4)	88(3)	94(d)
48(1)	deleted	92(1)

Appendix II...

MECHANICS' LIEN ACT PROVISION	COMMITTEE DRAFT PROVISION	DISCUSSION DRAFT PROVISION
49(1)	88(1)	deleted
49(2)	deleted	deleted
49(3)	deleted	92(2)
49(4)	88(2)	deleted
49(5)	deleted	70
50	69	93
51	89	-
52	remains in force unaffected	
53	90	94

Appendix III...

APPENDIX III

TABLE OF CONCORDANCE

MECHANICS' LIEN ACT

R.S.O. 1980, c. 261 to R.S.O. 1970 c.267

R.S.O. 1980	R.S.O. 1970
1	1
2	-
3	2
4	3
5	4
6	5
7	6
8	7
9	8
10	9
11	10
12	11
13	12
14	13
15	14
16	15
17	16
18	17
19	18
20	19

Appendix III...

R.S.O. 1980	R.S.O. 1970
21	20
22	21
23	-
24	22
25	-
26	23(1)
27	-
28	24
29	25
30	26
31	27
32	28
33	29
34	30
35	31
36	32
37	33
38	34
39	35
40	36
41	37
41	38
43	39
44	40

Appendix III...

R.S.O. 1980	R.S.O. 1970
45	41
46	42
47	43
48	44
49	45
50	46
51	47
52	48
53	49

km/sf